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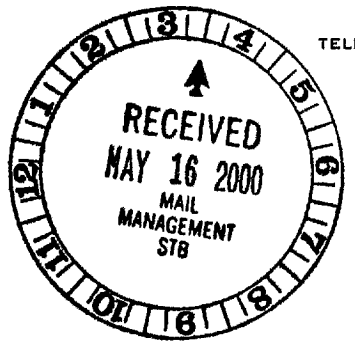

May 16, 2000

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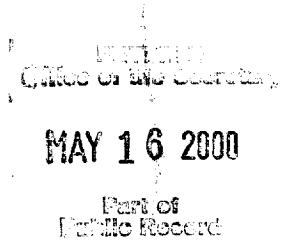

Re: STB Ex Parte No. 582 (Sub No. 1)

Dear Sirs:

Enclosed please find an original and twenty-five copies of the comments of The National Railway Labor Conference ("NRLC") in the above-referenced matter, filed in response to the Surface Transportation Board's Advance Notice of Proposed Rulemaking, dated March 31, 2000. Please note that these comments are filed on behalf of the NRLC's member railroads, except Canadian National – Illinois Central.

Very truly yours,

Donald J. Munro
Attorney for the NRLC

cc: Service List

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BEFORE THE SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF THE NATIONAL RAILWAY LABOR CONFERENCE

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May 16, 2000

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COMMENTS OF THE NATIONAL RAILWAY LABOR CONFERENCE

The National Railway Labor Conference ("NRLC") submits these comments in response to the Board's Advance Notice of Proposed Rulemaking ("ANPR") served March 31, 2000. The NRLC is an unincorporated association of 54 member railroads, including all of the nation's Class I railroads. The NRLC submits these comments on behalf of its member railroads and the National Carriers' Conference Committee ("NCCC"), which represents railroads in national multi-employer collective bargaining.

INTRODUCTION

As the Board is well aware, for over six decades the effects of rail consolidations on employees have been the subject of a fundamental trade-off: railroads may obtain modifications of collective bargaining agreements ("CBAs") necessary to implement consolidations that serve the public interest, and employees adversely affected by such consolidations receive generous protective allowances and other benefits. In recent years, the rail unions have objected to the modification of CBAs on repeated occasions in numerous forums, and have renewed those objections in comments and testimony before the Board during its initial hearings in this proceeding. Those complaints have been rejected consistently, by Congress, the Supreme Court, the lower courts, the ICC, and this Board. They should fare no better now.

The law and history underlying this debate are well settled. In 1920, Congress determined that the approval of a railroad consolidation in the public interest overrides all other restraints of law as necessary to allow implementation of the merger. The Supreme Court has since held that "all" law includes the Railway Labor Act ("RLA") and CBAs that are creatures of the RLA. *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U.S. 117, 132-33 (1991) ("*Dispatchers*"). Procedures for modification of CBAs necessary to achieve implementation of

consolidations date back to the Washington Job Protection Agreement ("WJPA") of 1936. Under this Agreement, labor received guarantees of extremely generous protection for employees adversely affected by consolidations. This basic trade-off, blessed by Congress at the urging of both labor and management in the statutory predecessor to current 49 U.S.C. §11326(a), is embodied in all modern railroad labor protective conditions. The unions' present demands would eliminate the benefits of this bargain for the carriers by depriving them of their ability to secure modifications of CBAs, while at the same time dramatically increasing the benefits for employees by greatly extending the maximum protective period.

There is no justification – legal or equitable – for undoing the fundamental bargain that underlies the existing protective conditions. Indeed, the Board lacks legal power to do so. The right of carriers to implement transactions approved in the public interest notwithstanding conflicting provisions of CBAs is the law of the land. See, *e.g.*, *Dispatchers*, 499 U.S. at 132-33; *CSX Corp. -- Control -- Chessie and Seaboard C.L.I.*, No. 28905 (Sub-No. 22) at 9-12, 16-23, 30-31 (served Sept. 25, 1998) ("*Carmen III*"). The existing regime was most recently reenacted by Congress with respect to major rail consolidations in the I.C.C. Termination Act of 1995. The Board is not free to undo what Congress has prescribed.

Nor is there any need to do so. To be sure, rail consolidations may have adverse effects on some employees – displacement, relocation, or job loss. But railroad employees receive generous protective benefits as compensation. Mergers in other industries have similar effects on employees, yet employees in those industries do not receive benefits remotely as generous as those received by employees in the rail industry. There is no plausible argument that rail employees are entitled to even more.

While the carriers are convinced that the basic trade-off underlying the existing labor protective conditions remains fair, they are now engaged in efforts to reach agreement with the unions for revised standards for CBA modification. The NCCC is attempting to address the unions' concerns while preserving the carriers' essential right to obtain modifications necessary to implement transactions. Indeed, the NCCC has already reached an agreement with the largest rail union, the United Transportation Union. Negotiations with the other unions have been productive and are ongoing.

Such voluntary agreements represent the best prospect for a peaceful and final resolution of the lingering dispute over modification of CBAs. The Board has noted that a voluntary agreement in 1936 inaugurated an era of "labor peace" in rail consolidations under which most implementing agreements were arrived at voluntarily, without the necessity for arbitration or for action by this Board or its predecessor. See *Carmen III* at 11. Indeed, voluntary agreements are still the norm in recent rail consolidations, notwithstanding the unions' current rhetoric about these issues. A new, voluntarily negotiated agreement on CBA modification procedures will engender fewer disputes in the future than any resolution imposed upon the parties.

In Part I, below, we show what will not be news to this Board: that the basic structure of modern labor protective conditions originated in the parties' adoption of the WJPA in 1936 and has been ratified time and again by Congress, the courts, the ICC, and this Board, leaving no room for further debate over the legality or wisdom of these conditions. This history also demonstrates convincingly that a voluntary agreement is the best means of resolving the labor protection issues raised in this proceeding. In Part II, we show that eliminating the right of carriers to obtain CBA modifications would impair the ability of carriers to provide public

transportation benefits that are the whole purpose and goal of rail mergers. Finally, in Part III, we demonstrate that the extremely generous benefits employees receive as part of the fundamental bargain underlying the present regime more than compensate employees for any adverse consequences of such consolidations.

I. Modification of CBAs to Permit Implementation of Rail Consolidations Was Agreed to by Labor in 1936 and is Rooted in Federal Statutes.

Underlying much of the unions' commentary on the power to modify CBAs under §§ 11321(a) and 11326(a) is the claim that the ICC discovered such a power only in 1983. The unions suggest, in essence, that the Board is free to return to an earlier approach under which CBAs were not subject to modification, or "cramdown" as they like to call it.

The unions' account of the history of this issue is simply incorrect. The power to override CBAs dates back to the provisions of the 1920 Act, now found in § 11321(a), and has been upheld by the Supreme Court. Moreover, CBA modification was the subject of agreement between the railroads and unions as early as 1936, in the WJPA. The fundamental bargain of the WJPA has been incorporated in protective conditions prescribed by the ICC, as well as federal statutory law in successive enactments of provisions now found in § 11326(a). This history rebuts the unions' claim that modification of CBAs is a relatively recent invention which the Board may abandon at its discretion. History also confirms that if the present rules are to be modified, voluntary industry-wide agreements, like the WJPA and the recent UTU agreement, offer the best prospect for a resolution that will not itself engender further disputes.

A. *The Origin of CBA Modification Procedures*

As the Supreme Court noted in *Dispatchers*,

> "Beginning with the Transportation Act of 1920, consolidation of the railroads of the country . . . became an established national policy . . . so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." 499 U.S. at 119 (punctuation and citations omitted).

To serve that public interest, the Transportation Act of 1920 included former 49 U.S.C. § 5(8), the first predecessor of § 11321(a). Like § 11321(a), § 5(8) exempted carriers participating in an approved consolidation from "all other . . . law . . . so far as may be necessary to carry out" the consolidation.

In 1933, in the depths of the Great Depression, Congress saw fit, in the Emergency Railroad Transportation Act of 1933 ("ERTA"), to compound the economic effects of the Depression on the railroads by imposing a "job freeze" on the industry. 48 Stat. 211, 214 (1933). Even though traffic and revenues were falling precipitously, the railroads were required to retain unneeded employees. Consolidation afforded no prospect of relief, because unneeded jobs could not be eliminated.

This problem was addressed in 1936 through negotiation of the WJPA, a national collective bargaining agreement under which carriers acquired the right to abolish jobs to implement "coordinations," the term the parties used for consolidations and similar transactions. (Exhibit A hereto). To that end, the WJPA established a negotiation and arbitration procedure that – while seriously flawed by the lack of internal time limits – was intended to provide a mechanism for authorizing "changes by carriers" that "are not possible under rules agreements"

negotiated under the RLA. *Southern Pacific Co.* v. *Brotherhood of Railroad Trainmen*, WJPA Docket No. 70, at 66 (1961) (Exhibit B).[1/]

The carriers paid a high price in exchange: years of generous compensatory labor protection for adversely affected employees. The principal labor protections were monetary allowances for dismissed and displaced employees during a protective period of up to five years, depending on an employee's length of service. Moreover, the negotiation and arbitration procedures of the WJPA were also a form of labor protection, because the required implementing agreement, whether arrived at through negotiation or arbitration, had to be in place before any selection of forces or assignment of employees in connection with the coordination could occur. WJPA § 5. This fact, combined with the lack of any internal time limits for these arbitration procedures, made it difficult to implement transactions in a timely manner. See *Southern Ry. – Control – Central of Georgia Ry.*, 317 I.C.C. 557, 566 (1962) (noting that WJPA procedures "may be subject to protracted delay").

Despite this shortcoming, the essential concept of the WJPA – procedures for modification of CBAs in exchange for protective benefits – became the "blueprint" for all subsequent labor protection conditions, including the *New York Dock* conditions. See *New York Dock Ry.* v. *United States*, 609 F.2d 83, 86 (2d Cir. 1979).

ERTA expired shortly after the WJPA was adopted. See *Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173 (1961) ("*Maintenance of Way Employes*"). Soon thereafter, before the enactment in 1940 of a statutory labor protection mandate, the ICC began to impose

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1/ See also *Brotherhood of Railway and Steamship Clerks* v. *Baltimore & O. R.R.*, WJPA Docket No. 106, at 143 (undated award providing that WJPA protection for covered employees would be effective through March 31, 1967) (Exhibit C).

labor protection conditions on rail consolidations. Those conditions were "very closely akin" to the WJPA.[2/] The Supreme Court upheld the ICC's discretion to impose such protection in *United States* v. *Lowden*, 308 U.S. 225 (1939). The Court also recognized that these protections were granted as the *quid pro quo* for changes in seniority rules and other CBA modifications. *Id.* at 233-35.

In the Transportation Act of 1940, Congress added former § 5(2)(f) to the Interstate Commerce Act, which required the ICC to impose labor protection in consolidations. Section 5(2)(f) was the first predecessor of current § 11326(a). "The legislative history of section 5(2)(f) clearly shows that the provisions contained therein . . . were intended as a mandate to protect adversely affected employees by a plan which would embody the basic principles of the" WJPA. *Southern Ry. – Control – Central of Georgia Ry.*, 331 I.C.C. at 158.

Section 5(2)(f) resulted from a recommendation by a "Committee of Six" appointed by President Roosevelt in 1938 to study and make recommendations on rail consolidations. See *Maintenance Employes*, 366 U.S. at 173-74. The Committee of Six "urged codification of the Washington Agreement and a bill drafted along those lines" became § 5(2)(f), *id.*, although § 5(2)(f) permitted the ICC to provide a four-year, rather than five-year, protective period, commencing with the effective date of the order approving a consolidation.

After the enactment of § 5(2)(f), the ICC formulated the so-called *New Orleans* conditions, which became standard for consolidations. *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952). As applied under the *New Orleans* conditions, the WJPA arbitration procedure was intended to be the "machinery for overcoming" the "merger-barring

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2/ *Southern Ry. – Control – Central of Georgia Ry.*, 331 I.C.C. 151, 159 (1967).

effect" of CBAs – "the key which unlocks the rules preventing the transfer and consolidation of work." *American Railway Supervisors Ass'n* v. *Southern Ry.*, WJPA Docket No. 141 at 16, 23 (1966).

In its 1967 decision in *Southern Railway – Control – Central of Georgia Railway*, the ICC expressly confirmed that incorporation of the WJPA procedures – modified to include "an arbitration clause which makes mandatory the submission to binding arbitration of disputes not settled by agreement" – into the *New Orleans* conditions was intended to permit carriers to obtain necessary modifications of CBAs. 331 I.C.C. at 164. In that case, implementation of a consolidation involved transfer of work from one of the consolidated carriers to another. The Board noted that "it would be necessary for the railroads to first secure a modification of [CBA] prohibitions [on transferring work] . . . by obtaining superseding contracts which would permit such transferring of work to occur. [¶] *The Washington Agreement is such a superseding contract.*" *Id.* at 165 (emphasis added). The ICC further noted that without an arbitration mechanism for carriers seeking CBA modifications to implement consolidations, "the Railway Labor Act . . . would seriously impede mergers." *Id.* at 171.[3/]

In 1976, Congress amended § 5(2)(f), requiring that the labor protection conditions imposed on consolidations be no less protective than the so-called "C-1 conditions" imposed under the Rail Passenger Service Act. In 1979, the ICC issued the *New York Dock* conditions in

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3/ Thus, contrary to the BMWE's contention, *Southern Railway* did not hold that CBAs could not be modified under the statutory predecessor to § 11321(a). See Comments of the Brotherhood of Maintenance of Way Employes and Brotherhood of Locomotive Engineers at 6. The language the BMWE cites from the *Southern Railway* merely rejected the possibility that the statute could preempt the WJPA itself, as the basic principles of the WJPA were incorporated in both the statute and the *New Orleans* conditions. See 331 I.C.C. at 168-71.

response to that legislative mandate. *New York Dock Ry. – Control – Brooklyn E.D. Terminal*, 360 I.C.C. 60, 84-90 (Appendix III) (1979), *aff'd*, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (1979). The *New York Dock* conditions – which were based on proposals requested by labor representatives for that transaction – substantially increased labor protection for employees.[4/] This generous protection has been characterized as "onerous" and "costly" to carriers by one court. *Simmons v. ICC*, 760 F.2d 126, 131 (7th Cir. 1985); see also *New York Dock*, 609 F.2d at 91 ("In overall effect, the 'New York Dock conditions' can be fairly characterized as significantly more protective of the interests of railway labor than any previously imposed single set of employee protective conditions").

The Board has said, in *Carmen III*, that the period from 1940 through 1980 was one of "labor peace" concerning the issue of modification of agreements to implement consolidations. *Carmen III* at 11. That is not because arbitrators did not modify CBAs before 1983, as the unions claim. It is because both labor and management understood that the law provided for override of CBAs, and that the basic bargain they made in 1936 – compensatory labor protection for employees in exchange for procedures for obtaining CBA modifications necessary to

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4/ Among other things, the protective period under *New York Dock* was increased to six years, and begins when the employee is adversely affected, rather than when the transaction is approved. *New York Dock* also increased dismissal and displacement allowances by providing that they must be indexed to all future general wage increases, and provided for preservation of an adversely affected employee's fringe benefits during his protective period. Article I §§ 5(a), 6(a), 8. In addition, *New York Dock* gave dismissed employees a right to priority rehiring, including the right to be rehired to jobs in other crafts, along with a right to retraining for such jobs at carrier expense. Article II. *New York Dock* continued to provide for arbitration of implementing agreements. In addition, to ensure that the requirement for pre-consummation implementing agreements would no longer "unduly delay" implementation of consolidations, as it had under the WJPA, *New York Dock* required the process to be completed in 90 days. Article 1 § 4.

implement a consolidation – remained binding under former §§ 5(2)(f) and 11347. Neither side tried to walk away from that fundamental trade-off.[5/]

B. *The Consistent Rejection of Union Objections to CBA Modifications*

In the early 1980s, unions sought to challenge the right of the carriers to seek modification of CBAs necessary to implement transactions (although they raised no complaint about the corresponding payment of protection allowances). The case of *Denver & Rio Grande W. R.R. – Trackage Rights – Missouri Pacific R.R.*, Finance Docket No. 30000 (Sub-No. 18) (served Oct. 19, 1983), was not, as the unions now assert, the "first time" the ICC held that the CBAs must yield as necessary to implement approved transactions.[6/] Rather, this case was simply the first case in which a union claimed otherwise. That claim failed, and the Commission reaffirmed that when "collective bargaining agreements conflict with a transaction which we have approved," § 11341(a) (now § 11321(a)) requires that those "agreements must give way to implementation of the transaction." Finance Docket No. 30000 at 6. *Id.*

The issue came before the ICC again in parallel cases involving CSXT and NS in 1988, where it again was decided against the unions. *CSX Corp. – Control – Chessie and Seaboard C.L.I.*, 4 I.C.C.2d 641 (1988); *Norfolk Southern -- Control -- Norfolk and Western Ry*, 4 I.C.C.2d 1080 (1988). After those decisions were reversed by the D.C. Circuit, the ICC issued *Carmen II* under § 11347 (the successor to § 5(2)(f) and predecessor of § 11326(a)), rejecting virtually every

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5/ In fact, our own observation is that even since 1980, most disputes arising from mergers have been resolved through voluntary implementing agreements, requiring relatively few arbitrations and involving only a handful of appeals to the ICC and this Board.

6/ Comments of the Brotherhood of Maintenance of Way Employes and Brotherhood of Locomotive Engineers at 9; see also Transcript of March 8, 2000 Hearing ("March 8 Tr.") at 83.

argument pressed by the unions now. *CSX Corp. – Control – Chessie and Seaboard C.L.I.*, 6 I.C.C.2d 715 (1990). Finally, in 1991, the Supreme Court reversed the D.C. Circuit, squarely holding that § 11341(a) – now § 11321(a) – preempts CBAs as necessary to implement consolidations. *Dispatchers*, 499 U.S. at 132-33.

In 1995, Congress thoroughly re-examined the Interstate Commerce Act, including § 11347. The result was the I.C.C. Termination Act of 1995. The Act made no change in the protective conditions required in major rail consolidations and instead reenacted § 11347 as § 11326(a) without substantive change.[7/] See *Carmen III* at 1 n.1. That was a legislative reenactment of the provision that mandated *New York Dock* in the first place. Thus, Congress left *New York Dock*, incorporating the parties' basic trade-off, intact.

In September 1998, in *Carmen III,* the Board turned to the single issue the Supreme Court left open in *Dispatchers*: whether § 11326(a) limits § 11321(a). The Board, in accordance with earlier court, I.C.C. and Board decisions, concluded that in major rail consolidations subject to the *New York Dock* conditions, §§ 11321(a) and 11326(a) are independent and coextensive sources of authority for the Board and its delegated arbitrators to modify CBAs when necessary to implement consolidations. *Carmen III* at 16-23, 30-31. The Board also recognized that the carriers' right to obtain CBA modifications under §§11321(a) and 11326(a) is essential to the implementation of consolidations and that the process for obtaining such modifications is based on an agreement that the unions entered into voluntarily:

7/ In addition, the Termination Act recodified § 11341(a) as § 11321(a) without substantive change. *Id.*

> "the enactment of section 5(2)(f) in the Transportation Act of 1940 codified the legal framework that had been agreed upon by the negotiators of the WJPA in 1936, and set the stage for a 40-year era of labor peace with regard to mergers and consolidations. *Upon approving a post-1940 merger or consolidation proposed by two or more railroads, the ICC would impose WJPA-based protective conditions. Rail management and rail labor would then negotiate implementing agreements to permit smooth implementation of the transaction, and, in the event of impasse, arbitrators were empowered to modify CBAs when necessary to implement the transaction.* Prior to 1936, these negotiations would have been conducted under the interminable RLA dispute resolution procedures applicable to major disputes, and deadlock might well have been the result. After 1940, the mechanism for an RLA bypass having been put in place, these negotiations would have been conducted under the WJPA, under comparable procedures negotiated in connection with the particular transaction, or under the comparable section 5(2)(f)-mandated procedures contained in the ICC's labor conditions. These various procedures, all of which were substantially the same and provided for mandatory binding arbitration, were designed to resolve covered disputes with a certain measure of dispatch and to overcome the obstacle of CBA provisions that might otherwise have prevented consummation of an approved transaction." *Carmen III* at 10-11 (emphasis added).

Now, shortly after *Carmen III*, the unions are back before the Board, asking it to reverse a policy which the Board and the ICC have consistently followed for decades and is incorporated into federal statutory law. Moreover, the unions want to have their cake and eat it too. Not only do they want to undermine the fundamental statutory scheme and be released from procedures for modifying CBAs that have been used for decades, they also want the carriers to pay even more labor protection benefits.

Much as the unions would like to plow old ground yet again, this particular debate has now been conclusively resolved. Congress, the Supreme Court, and this Board have spoken: Under §§ 11321(a) and 11326(a), orders approving consolidations preempt CBAs, requiring their

modification when necessary to implement approved consolidations. There is no justification for reconsidering that principle again in this forum, nor any power to do so. Thus, the unions' proposals should be and indeed must be rejected.

C. *The Best Prospect for the Future: The UTU Agreement and Negotiations With Other Unions*

As the history of this dispute shows, the Supreme Court's decision in *Dispatchers* clearly resolved the question whether CBAs may be modified under § 11321(a), but the decision did not quiet the debate over major rail consolidations. Neither did *Carmen II*, or *Carmen III*, although *Carmen III* thoroughly answers any remaining questions under both § 11321(a) and § 11326(a) with respect to major consolidations subject to *New York Dock*. Thus, there is little reason to expect that any new rules issued by the Board would be any more likely to resolve these issues.

Rather, as Chairman Morgan stated at the March 8 hearing, "some kind of agreement" would be "the best way" to resolve the merger-related labor disputes that have divided the parties in recent years. March 8 Tr. at 67. History shows that the Chairman was clearly correct. As the Board noted in *Carmen III*, it was the WJPA – a voluntarily negotiated agreement – that has been the key to labor peace for years. See *Carmen III* at 11.

No one can doubt that negotiated resolutions are far more likely to end discord than imposed resolutions. Imposed resolutions tend to engender resistance from any group that thinks it was treated unfairly. For example, the unions here complain of unfair treatment not just by arbitrators, but also by the courts, the ICC, and this Board. Even the prevailing party before a tribunal may feel aggrieved and inclined to engage in further disputes with the other side if the party does not receive all that it wants. By contrast, in negotiations the parties agree to what they

can live with, and generally have an initial meeting of minds as to the meaning and purpose of the new rules they establish. Thus, negotiated resolutions are less likely to engender disputes.

The carriers believe that the current rules regarding implementation of railroad mergers are still more than fair to employees. Nevertheless, because the carriers are committed to preserving and enhancing cooperation with labor in connection with rail consolidations, the NCCC initiated negotiations with the unions late last year to find a common basis for a new agreement that addresses the unions' concerns but still preserves the right to seek modifications of CBAs without resort to the protracted RLA procedures.

In February of this year, the NCCC reached agreement with the UTU, the largest rail union. That agreement recognizes the continuing need to adjust CBAs to implement consolidations approved in the public interest, but makes substantial concessions to the union. *Revised Standards for Preemption of Collective Bargaining Agreements for Transactions Initiated Pursuant to Section 11323 of the Interstate Commerce Act* (Feb. 11, 2000) ("UTU Agreement") (Exhibit D). In particular, when workforces subject to differing CBAs are consolidated, the UTU Agreement provides that a single CBA will apply, but gives the union the right to select which CBA will apply to the consolidated work force. *Consolidation or Coordination § 2.* The matter goes to arbitration only if the union fails to select an agreement within the time specified for negotiations under *New York Dock.* Even then, the arbitrator is required to choose the agreement "most beneficial to the employees involved as to rates of pay,

rules and working conditions . . . ." *Id.* § 2.[8/] No additional labor protection beyond *New York Dock* is provided.

The NCCC is engaged in negotiations with the other unions in hopes of reaching similar agreements with them. The NCCC will not accept agreements that would impede the carriers' ability to implement consolidations. But the carriers have every incentive to reach agreements with all the unions, because stability in labor relations is essential to the orderly implementation of consolidations.

II. Eliminating the Power to Modify CBAs That Stand in the Way of Implementation Would Impair the Public Transportation Benefits Achievable in Approved Consolidations

The unions' principal proposal in this proceeding is to eliminate the modification of CBAs under §§ 11321(a) and 11326(a) in major rail consolidations. In addition to the legal problems with that proposal outlined above, such a result would be contrary to the public interest expressed in the Rail Transportation Policy.

Virtually all consolidations require modification of collectively bargained seniority districts and rosters to combine the consolidated carriers' employees in each craft. See *Carmen II*, 6 I.C.C.2d at 717-18, 742. So, too, virtually all consolidations require modification of other collectively bargained seniority, scope, and work jurisdiction rules to ensure that employees can be deployed where they are needed in consolidated operations, as the Supreme Court and the ICC have recognized. *Lowden*, 308 U.S. at 233; *Carmen II*, 6 I.C.C.2d at 717-18, 721, 732-43. Other

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8/ The UTU Agreement also permits transfer of work, positions, and employees, and modification of seniority districts and rosters and of "work jurisdiction" (scope and seniority) rules to allow employees to perform work throughout a consolidated system. The agreement sharply limits other changes.

modifications are also necessary to implement a consolidation. For example, when jobs from two consolidated carriers are combined in a centralized operation or at a centralized facility, it would effectively frustrate the centralization if the CBAs from each involved carrier continued to apply. The scope and work rules in the agreements would in most cases keep the employees, and thus the operations, of each carrier entirely separate. Nominally, the carriers would be consolidated, but in reality, there would be a Carrier A operation and a Carrier B operation just as there had been prior to the consolidation; no public transportation benefits would be achieved.

If §§ 11321(a) and 11326(a) could not be used to modify CBAs under the expeditious *New York Dock* procedures, carriers would have to seek modifications under the RLA's collective bargaining procedures. As noted, these procedures are notoriously "'long and drawn out,'" indeed, "'almost interminable.'" *Dispatchers*, 499 U.S. at 133 (citations omitted). Compulsory arbitration is not available.[9/] If parties exhaust the collective bargaining procedures without reaching agreement, the unions are free to strike.[10/] As the Supreme Court has held, subjecting implementation of consolidations to these RLA collective bargaining processes "would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated." *Id.* This is what the unions seek.

It is incontestable that such a result would be contrary to the public interest. For decades, the Rail Transportation Policy of the United States has been to maintain a sound, economically viable rail transportation system. Approved rail consolidations have served the public interest reflected in that policy. Consolidations have contributed to a modern rail system that provides

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9/ See, *e.g.*, *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969).

10/ See, *e.g.*, *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 244 (1966).

employees and the public with an unprecedentedly safe operating environment and shippers with equally unprecedented efficiency and lower rates. As the Supreme Court recognized in *Dispatchers*, the public interest in rail consolidations "cannot be dissociated" from the public interest in "an adequate and efficient transportation system." 499 U.S. at 119. It would "defeat" the public transportation benefits of consolidations if CBAs could trump the authority to implement approved consolidations. *Id.* at 133. Thus, if the Board determines that future transactions are in the public interest, the public interest will require that §§ 11321(a) and 11326(a) remain available to permit implementation notwithstanding obstacles arising from pre-existing CBAs.

Thus, there is no basis for adopting the unions' proposal to forego exercise of the powers provided under §§ 11321(a) and 11326(a). March 8 Tr. at 80-81. That would constitute an administrative repeal of statutory provisions that are essential to consolidations, which "cannot be dissociated from" the public interest in maintaining a safe, adequate, and efficient rail transportation system. *Dispatchers*, 499 U.S. at 119. Only Congress can repeal these statutory provisions.[11/]

11/ It should also be noted that modification or abrogation of CBAs occurs in other industries, and employees in those industries receive far less favorable treatment in this regard than railroad employees. The *New York Dock* conditions permit CBA modification in rail consolidations only if necessary to implement the transactions, and only if the involved union agrees or an arbitrator approves. With respect to industries covered by the National Labor Relations Act ("NLRA"), however, after one company takes over the operations of another company, the acquirer is not bound to honor the predecessor's CBAs and is free to establish "unilaterally" the "initial terms" on which it will retain any of the predecessor's employees unless the acquirer fails to preserve its rights in that regard. *NLRB* v. *Burns Int'l Security Services*, 406 U.S. 272, 285-91, 294-95 (1972); *Howard Johnson Co.* v. *Hotel Restaurant Employees*, 417 U.S. 249, 254-57 (1974). In consolidations under the NLRA, if the acquirer preserves its rights the acquired companies' CBAs "terminate[ ]" when the companies' operations and workforces are

(continued...)

III. The *New York Dock* Conditions Provide Ample Protection for Employees Adversely Affected by Consolidations

Much of the union testimony in the Board's initial hearings was devoted to dramatic horror stories about hardships that major rail consolidations allegedly impose on employees. They seek a four-year extension of the protective period to address these supposed hardships.[12/]

There is no justification for extending the protective period or increasing labor protection in any way, as we show below. The *New York Dock* conditions already impose "onerous" costs on consolidations to compensate employees for adverse effects caused by these transactions. See *Simmons*, *supra*, 760 F.2d at 131. That protection is already more than adequate, far exceeding even the most generous protection available to employees affected by mergers in other industries. We also show that the BMWE's and BLE's complaints about traveling distances have nothing to do with consolidations.

A. *Job Loss*

The unions have pointed out that rail consolidations result in loss of employment for some employees. This does not justify any extension of the protective period.

While some jobs may be abolished as a result of rail consolidations, the unions have greatly exaggerated the extent to which this has occurred. One union commentator suggested that rail employment fell from 488,000 to 178,000 between 1975 and the present because of mergers. United Transportation Union's Written Statement at 2. But many other factors

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11/ (...continued)
integrated. See *Howard Johnson*, 417 U.S. at 259 n.4; see also, *e.g.*, *Lauer's Furniture Stores, Inc.*, 246 N.L.R.B. 360, 365 (1979).

12/ See Advance Notice of Proposed Rulemaking, 65 Fed. Reg. 18,021, 18,024 (Apr. 6, 2000).

contributed much more importantly to declines in employment during this period: major railroad bankruptcies, including the liquidations of the Rock Island and Milwaukee Road; loss of business to other modes of transportation; technological innovations that reduced the need for many employees; and reforms in archaic work rules that permitted the carriers to abolish redundant jobs. For example, in 1991 and 1992 alone, through procedures established by the imposed agreement of 1991 between the UTU and the NCCC, the carriers abolished some 22,000 jobs.

Moreover, the unions overlook the fact that rail consolidations have saved many thousands of jobs in this industry in times of economic crisis. All employees on a bankrupt, liquidated railroad lose their jobs.

Nor is loss of employment unique to rail consolidations. When large companies consolidate surplus employees frequently are furloughed. In fact, recent mergers in other industries have resulted in much deeper employment cuts than have recent major rail transactions. Mobil has announced that approximately 9,000 employees from the combined Mobil/Exxon work force will lose their jobs as a result of the merger of the two companies.[13/] Bank of America has announced that it will abolish 5,000 - 8,000 jobs within the next two years as a result of its merger with Nationsbank.[14/] British Petroleum dismissed nearly 1,000 employees in Cleveland as a result of the company's 1998 merger with Amoco, and

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13/ "Mobil's Severance Plan Softens Merger's Blow," *Dallas Morning News* (Jul. 12, 1999), http://click.hotbot.com/director.asp?id=1&target=http://www.dallasnews.com/business/0712biz4mobil.htm&query=mobil+merger+severance&rsource=LCOSADVF.

14/ See "A Year Later, Merger Sinks In," *Law News Network* (May 4, 1999), http://www.lawnewsnet.com/stories/A1123-1999May3.html.

approximately 6,000 world-wide.[15/] Last year, when American Stores Company merged with Albertsons, Inc., American Stores planned to abolish 800 jobs in Salt Lake City alone.[16/]

Major railroad consolidations are unique in one important sense, however, because the *New York Dock* conditions are imposed upon those consolidations, and no remotely comparable benefits are mandated for employees in other industries. As the Board is aware, under Article I § 6 of *New York Dock*, a "dismissed employee," *i.e.*, one who is deprived of employment as a result of a transaction subject to the conditions, is entitled to continued wages (indexed for future general wage increases) and benefits for up to six years from the date that he is dismissed.

Some companies in other industries may grant severance pay to employees who are rendered surplus by a consolidation, but six years of continued pay and benefits is unheard of. In the British Petroleum/Amoco merger, employees who lost their jobs were given up to four weeks of pay for every year they had worked, capped at 16 ½ weeks' pay, which was considered extremely generous at the time.[17/] In the Mobil/Exxon merger, Mobil plans to grant its craft employees four weeks of pay per year of service, capped at two years' pay, and an amount equal to twice the company's annual contribution to their pension accounts. This offer was

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15/ See "Mobil's Severance Plan Softens Merger's Blow," *supra*; "BP and Amoco Merger to Sock Cleveland," *News Net 5* (Aug. 11, 1998), http://www.newsnet5.com/news/stories/news-980811-091458.html.

16/ See "American Stores Merger to Cut 800 Jobs in Salt Lake City," *Salt Lake Tribune* (June 23, 1999), http://www.dced.state.ut.us/newscntr/innews/amstoresjobs.htm.

17/ See "Mobil's Severance Plan Softens Merger's Blow," *supra.* BP advised us that only employees with 13 years of seniority were eligible for the maximum amount. Employees also received up to $5,000 in educational assistance to help them get started in a new career. Article II of *New York Dock* requires carriers to retrain dismissed employees for other available positions on the railroad at no expense to the employee if the employee wants to come back to work and is qualified.

characterized as "unusually generous" by analysts.[18/] Yet it is not nearly as generous as *New York Dock.*

We cannot emphasize strongly enough, moreover, that severance offers such as those made by British Petroleum and Mobil are not the norm outside the railroad industry. The British Petroleum/Amoco merger was the largest in history at the time it was approved; British Petroleum, Amoco, Mobil, and Exxon are large multi-national corporations, their mergers will result in loss of employment for thousands of employees around the world. In those circumstances, it is not difficult to understand why the companies decided to offer severance plans that analysts and the media regarded as remarkably generous. Indeed they were. Outside the railroad industry, in a reduction in force or downsizing for any reason, including a consolidation, the average severance pay for employees is five weeks' pay, and the median is two weeks' pay.[19/]

Even if there were some justification for treating rail employees more favorably than those in other industries, there is certainly no justification for increasing the gap by extending the protective period under the *New York Dock* conditions. Even an employee with only railroad-specific skills should be able to find another job within six years. Moreover, dismissed employees have priority rights to be rehired to open positions on their home railroad, including

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18/ "Mobil's Severance Plan Softens Merger's Blow." We have been advised by Mobil that the "variable bonus" described in this article refers to the lump sum wage adjustment granted to Mobil employees in lieu of general wage increases and is factored into the basic severance pay offer. Employees will also be eligible for continued fringe benefits with company contributions toward the premiums for some part of the two year period after they lose their jobs, and will receive outplacement counseling and retraining benefits.

19/ Lee, Hecht, Harrison, "Separation and Separation Benefits – An Update to our Severance Study" (2000), http://www.lhh.com/us/rschinfo/studies/sevsepbenefits.html.

positions in other crafts for which they are or can become qualified. Article II. In addition, Article I § 6(d) allows carriers to recall dismissed employees to service or to comparable positions in other crafts that do not require the employees to relocate their homes. Carriers have every incentive to avail themselves of these options, because if an employee comes back to work the employing carrier gets the value of his work in exchange for what it pays him rather than simply paying him labor protection for doing nothing. In short, six years of protection is enough.

B. *Compensation Reduction*

Some unions have claimed that rail consolidations reduce employee wages and benefits.[20/] These claims are also baseless, and certainly do not warrant any extension of the protective period.

First, under Article I § 5 of *New York Dock*, an employee who is displaced to a job paying a lower wage rate because of a consolidation is entitled to a monthly "displacement allowance" for up to six years after he is displaced. The employee's allowance is the difference between his average monthly earnings from the job he had before he was displaced and his average monthly earnings in his new job; the allowance is indexed to all future general wage increases applicable to his craft. Article I § 8 ensures that his fringe benefits will continue. Before a displaced employee's protective period ends he may well have opportunities to exercise seniority to a higher-paying job due to natural attrition of more senior employees in his craft.

Once again, displacement of employees to lower-paying jobs is not a unique feature of rail consolidations, but six years of pay at pre-displacement levels is. The British

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20/ See, *e.g.*, March 8 Tr. at 45 (BMWE) & 49 (BLE).

Petroleum/Amoco and Mobil/Exxon merger protection offers, which were regarded as extraordinarily generous, did not provide benefits for displaced employees.

Some unions have also expressed concerns that *New York Dock* arbitrators have authority to apply a single agreement to a consolidated operation and may choose the agreement with the lower pay rate. The BMWE in particular has complained about such an award in connection with Norfolk Southern's commencement of operations over a portion of Conrail's rail lines. See March 8 Tr. at 45. But as the BMWE concedes, the employees' pre-acquisition rates of pay are protected for six years from the date of the effective date of the award. *Id.* Again, so generous an arrangement is unheard of in other industries; the BMWE has no valid complaint. In any event, the BMWE has agreed to the terms of the award at issue (with certain modifications), and thus should not be heard to complain about it now.

C. *Employee Relocation*

Some unions, in particular the American Train Dispatchers Association department of the BLE, have complained that consolidations result in facility and operational centralizations that require some employees to relocate themselves and their families. See March 8 Tr. at 64.

Centralization and resulting elimination of redundant facilities or operations are frequently features of consolidations. When redundant facilities or operations are closed in whole or part, employees who work at those facilities may have to move to the area where the centralized facility is located. But relocations are not unique to rail consolidations. Centralization of functions occurs when consolidations and corporate restructuring occur in other industries; employees in those industries also are forced to move with their jobs or find jobs with other employers near their homes. For example, as a result of British Petroleum's merger with

Amoco, British Petroleum centralized a variety of functions that had been performed in Cleveland, Ohio at facilities elsewhere and over 1,500 employees were required to relocate.[21/] In the Bank of America/Nationsbank merger, employees were required to move from California to North Carolina.[22/] And in the American Stores/Albertsons merger last year, 275 employees were required to relocate from Salt Lake City to other cities, including Boise, Idaho.[23/]

Here again, the relocation benefits available to rail employees simply do not exist in other industries. Under Article I § 9 of *New York Dock*, if an employee is required to relocate as a result of a consolidation, the carrier must pay "all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family," and also must pay the employee at his usual rate of pay for up to three days while he moves. Under Article I § 12, the carrier must even reimburse the employee for any losses he incurs on the sale of his home or the cancellation of an unexpired lease of his residence. And if he is furloughed within three years after he relocates and wants to move back to his original point of employment, the carrier must pay Article I § 9 moving expenses for the return move. The NRLC is unaware of any arrangements for comparable moving benefits for craft employees in other industries. For example, the Mobil/Exxon merger protection arrangement that was regarded as so generous covers some of the same relocation expenses as *New York Dock*, but imposes a $20,000 cap on total reimbursement. There is no cap under *New York Dock*.

21/ See "More BP Workers Are Affected By Merger," *supra*; "BP and Amoco Merger to Sock Cleveland," *supra.*

22/ See "A Year Later, Merger Sinks In," *supra.*

23/ See "American Stores Merger to Cut 800 Jobs in Salt Lake City," *supra.*

Finally, this complaint of the unions ignores an important element of the bargain underlying the labor protective conditions, dating back to the WJPA. As the ICC observed in *Carmen II* and this Board reiterated in *Carmen III*, transfer of work and employees from one railroad to another are actions "that would be necessary to permit almost any consolidation of the functions of two merging railroads," and these procedures are what make it possible. *Carmen II*, 6 I.C.C.2d at 742; *Carmen III* at 23. The Board should not relieve the unions of this aspect of their bargain, particularly not when employee transfers are "necessary to permit almost any consolidation" and employees are fully compensated for their relocation expenses.

D. *Traveling Distances*

Representatives of the BMWE and the BLE complained that consolidations result in traveling employees having to travel farther from home to do their work. *E.g.* March 8 Tr. at 42, 69, 85-86. This issue is a red herring.

Consolidations do not force the employees to travel. The BMWE employees in question, those who perform major track repair and construction known as "production work," travel because it is a necessary part of their jobs; the locomotive engineers in question travel because their job is to move trains for long distances. Furthermore, consolidations do not make traveling any harder on maintenance-of-way employees or locomotive engineers than it otherwise would be, and if they travel farther from home because of a consolidation or other reason, they are already entitled to ample compensation for that under the national BMWE and BLE CBAs.

Mergers may sometimes increase the distances some traveling employees must travel from their homes. But the unions greatly exaggerate the magnitude of this effect. Under the congressionally imposed 1991 national agreement with the BMWE, carriers obtained the right to

require regional and system gangs to work hundreds or thousands of miles away from their homes for extended periods. Carriers that did not elect the national agreement rules had local agreements that they considered superior. Thus, even before the recent round of mergers, regional and system gang employees were working hundreds and sometimes thousands of miles from their homes, as the BMWE conceded in 1996 before Presidential Emergency Board 229.[24/] Jobs on regional and system gangs result in higher compensation for maintenance-of-way jobs because production work cannot be performed in cold weather due to the characteristics of steel rail, and if an employee can travel in winter to work sites in a warmer location, he can work more of the year and earn more. Consolidations can therefore actually increase work opportunities for regional and system gang employees. Furthermore, under the 1996 national BMWE CBA, an employee who works over 400 miles from his home is entitled to air transportation home at the expense of his employer every three weeks.[25/] Thus, more employees than the carriers can use volunteer for those gangs.[26/]

Likewise, the BLE's complaint focuses on the notion that consolidations may create longer train runs, thereby requiring engineers to travel farther per tour of duty than they did before. See March 8 Tr. at 87. However, engineers on longer runs are generally paid more highly than engineers on shorter runs because an engineer's pay on a road job is based largely on

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24/ See transcripts of hearing before Presidential Emergency Board 229: May 29 at 262 (describing a gang on Norfolk & Western that was required to travel from Norfolk, Virginia to Indiana and Missouri) and May 28 at 113 ("A characteristic of these assignments [is] . . . extensive travel between home and the report location").

25/ Mediation Agreement dated September 6, 1996 between railroads represented by the National Carriers' Conference Committee and employees of such railroads represented by the Brotherhood of Maintenance of Way Employes, Article XIV § 2.

26/ See Carriers' Exhibit 11 before Presidential Emergency Board 229 at 20 (May, 1996).

the number of miles he takes his train.[27/] In fact, the jobs on longer runs are among the most highly paid craft jobs on the railroads, largely held by engineers with the greatest seniority. Thus, if a consolidation creates a job with a longer run, that creates a higher pay opportunity for an engineer.

The railroad industry is a transportation industry, after all. There are inconveniences associated with traveling jobs in such an industry. But that is in the nature of the jobs. These inconveniences are not caused by consolidations, but even if they were, any increased inconvenience would be more than offset by resulting benefits to the employees.

27/ The mileage basis of pay for road engineers is set forth in Article IV § 2 of the 1991 national BLE agreement, which was not changed by the 1996 national CBA.

CONCLUSION

The Board should not address the labor issues in the Advance Notice of Proposed Rulemaking. Certainly it should not intervene in ways that might affect negotiations between rail labor and management. If the Board considers the labor issues on the merits, it should reject the unions' proposals. Those proposals are contrary to law and would impair public transportation benefits of rail consolidations.

Respectfully submitted,

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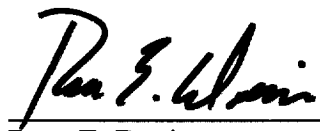
May 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of May, 2000 served copies of the foregoing on all parties of record in this proceeding, by first-class mail.



Ross E. Davies

APPENDIX

Exhibit

Washington Job Protection Agreement of 1936. ..... A

Southern Pacific Co. v. Brotherhood of Railroad Trainmen,
WJPA Docket No. 70 (1961) ..... B

Brotherhood of Railway and Steamship Clerks v. Baltimore & O. R.R.,
WJPA Docket No. 106 (undated) C

Revised Standards for Preemption of Collective Bargaining Agreements
for Transactions Initiated Pursuant to Section 11323 of the Interstate
Commerce Act (Feb. 11, 2000) ..... D

AGREEMENT OF MAY, 1936, WASHINGTON, D. C.

This agreement is entered into between the carriers listed and defined in Appendices "A", "B" and "C" attached hereto and made a part hereof, represented by the duly authorized Joint Conference Committee signatory hereto, as party of the first part, and the employes of said carriers, represented by the organizations signatory hereto by their respective duly authorized executives, as party of the second part, and, so far as necessary to carry out the provisions hereof, is also to be construed as a separate agreement by and between and in behalf of each of said carriers and its employes who are now or may hereafter be represented by any of said organizations which now has (or may hereafter have during the life of this agreement) an agreement with such carrier concerning rates of pay, rules or working conditions.

The signatories hereto, having been respectively duly authorized as aforesaid to negotiate to a conclusion certain pending issues concerning the treatment of employes who may be affected by coordination as hereinafter defined, hereby agree:

Section 1. That the fundamental scope and purpose of this agreement is to provide for allowances to defined employees affected by coordination as hereinafter defined, and it is the intent that the provisions of this agreement are to be restricted to those changes in employment in the Railroad Industry solely due to and resulting from such coordination. Therefore, the parties hereto understand and agree that fluctuations, rises and falls and changes in volume or character of employment brought about solely by other causes are not within the contemplation of the parties hereto, or covered by or intended to be covered by this agreement.

Section 2 (a). The term "coordination" as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.

(b) The term "carrier" as used herein when it refers to other than parties to this agreement means any carrier subject to the provisions of Part I of the Interstate Commerce Act; when it refers to a party to this agreement it means any company or system listed and described in Appendices "A", "B" or "C" as a single carrier party to this agreement.

(c) The term "time of coordination" as used herein includes the period following the effective date of a coordination during which changes consequent upon coordination are being made effective; as applying to a particular employee it means the date in said period when that employee is first adversely affected as a result of said coordination.

Section 3 (a). The provisions of this agreement shall be effective and shall be applied whenever two or more carriers parties hereto undertake a coordination; and it is understood that if a carrier or carriers parties hereto undertake a coordination with a carrier or carriers not parties hereto, such coordination will be made only upon the basis of an agreement approved by all of the carriers parties thereto and all of the organizations of employees involved (parties hereto) of all of the carriers concerned. No coordination involving classes of employees not represented by any of the organizations parties hereto shall be undertaken

by the carriers parties hereto except in accord with the provisions of this agreement or agreements arising hereunder.

(b) Each carrier listed and established as a separate carrier for the purposes of this agreement, as provided in Appendices "A", "B" and "C", shall be regarded as a separate carrier for the purposes hereof during the life of this agreement; provided, however, that in the case of any coordination involving two or more railroad carriers which also involves the Railway Express Agency, Inc., the latter company shall be treated as a separate carrier with respect to its operations on each of the railroads involved.

(c) It is definitely understood that the action of the parties hereto in listing and establishing as a single carrier any system which comprises more than one operating company is taken solely for the purposes of this agreement and shall not be construed or used by either party hereto to limit or affect the rights of the other with respect to matters not falling within the scope and terms of this agreement.

Section 4. Each carrier contemplating a coordination shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employes of each such carrier and by sending registered mail notice to the representatives of such interested employes. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employes of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.

Section 5. Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

Section 6 (a). No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the time of the particular coordination, except however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position

which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

(b) The protection afforded by the foregoing paragraph shall be made effective whenever appropriate through what is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

Section 7 (a). Any employee of any of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination shall be accorded an allowance (hereinafter termed a coordination allowance), based on length of service, which (except in the case of an employee with less than one year of service) shall be a monthly allowance equivalent in each instance to sixty per cent (60%) of the average monthly compensation of the employee in question during the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the coordination. This coordination allowance will be made to each eligible employee while unemployed by his home road or in the coordinated operation during a period beginning at the date he is first deprived of employment as a result of the coordination and extending in each instance for a length of time determined and limited by the following schedule:

Length of Service	*Period of Payment*
1 yr. and less than 2 yrs.	6 months
2 yrs. " " " 3 "	12 "
3 yrs. " " " 5 "	18 "
5 yrs. " " " 10 "	36 "
10 yrs. " " " 15 "	48 "
15 yrs. and over	60 "

In the case of an employee with less than one year of service, the total coordination allowance shall be a lump sum payment in an amount equivalent to sixty (60) days pay at the straight time daily rate of the last position held by him at the time he is deprived of employment as a result of the coordination.

(b) For the purposes of this agreement the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for one month's service for each month in which he performed any service (in any capacity whatsoever) and twelve such months shall be credited as one year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization he will be given credit for performing service while so engaged on leave of absence from the service of a carrier.

(c) An employee shall be regarded as deprived of his employment and entitled to a coordination allowance in the following cases:

1. When the position which he holds on his home road is abolished as result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation, or
2. When the position he holds on his home road is not abolished but he loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a result of said coordination, or by other employees, brought about as a proximate consequence of the coordination, and if he is unable by the exercise of his seniority rights to secure another position on his home road or a position in the coordinated operation.

(d) An employee shall not be regarded as deprived of employment in case of his resignation, death, retirement on pension or on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furloughed because of reduction in forces due to seasonal requirements of the service; nor shall any employee be regarded as deprived of employment as the result of a particular coordination who is not deprived of his employment within three years from the effective date of said coordination.

(e) Each employee receiving a coordination allowance shall keep the employer informed of his address and the name and address of any other person by whom he may be regularly employed.

(f) The coordination allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the coordination allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a coordination allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a coordination allowance accordingly if any is due.

(g) An employee receiving a coordination allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his

place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(h) If an employee who is receiving a coordination allowance returns to service the coordination allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a coordination allowance. During the time of such reemployment however he shall be entitled to protection in accordance with the provisions of Section 6.

(i) If an employee who is receiving a coordination allowance obtains railroad employment (other than with his home road or in the coordinated operation) his coordination allowance shall be reduced to the extent that the sum total of his earnings in such employment and his allowance exceeds the amount upon which his coordination allowance is based; provided that this shall not apply to employees with less than one year's service.

(j) A coordination allowance shall cease prior to the expiration of its prescribed period in the event of:

1. Failure without good cause to return to service in accordance with working agreement after being notified of position for which he is eligible and as provided in paragraphs (g) and (h).
2. Resignation.
3. Death.
4. Retirement on pension or on account of age or disability in accordance with the current rules and practices applicable to employees generally.
5. Dismissal for justifiable cause.

Section 8. An employee affected by a particular coordination shall not be deprived of benefits attaching to his previous employment, such as free transportation, pensions, hospitalization, relief, etc., under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

Section 9. Any employee eligible to receive a coordination allowance under section 7 hereof may, at his option at the time of coordination, resign and (in lieu of all other benefits and protections provided in this agreement) accept in a lump sum a separation allowance determined in accordance with the following schedule:

Length of Service	*Separation Allowance*
1 year & less than 2 years	3 months' pay
2 years " " 3 "	6 " "
3 " " " " 5 "	9 " "
5 " " " " 10 "	12 " "
10 " " " " 15 "	12 " "
15 years and over	12 " "

In the case of employees with less than one year's service, five days' pay, at the rate of the position last occupied, for each month in which they performed service will be paid as the lump sum.

(a) Length of service shall be computed as provided in Section 7.

(b) One month's pay shall be computed by multiplying by 30 the daily rate of pay received by the employee in the position last occupied prior to time of coordination.

Section 10 (a) Any employee who is retained in the service of any carrier involved in a particular coordination (or who is later restored to service from the group of employees entitled to receive a coordination allowance) who is required to change the point of his employment as result of such coordination and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter, (not to exceed two working days), used in securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier responsible and the organization of the employee affected. No claim for expenses under this Section shall be allowed unless they are incurred within three years from the date of coordination and the claim must be submitted within ninety (90) days after the expenses are incurred.

(b) If any such employee is furloughed within three years after changing his point of employment as a result of coordination and elects to move his place of residence back to his original point of employment, the carrier shall assume the expense of moving his household and other personal effects under the conditions imposed in paragraph (a) of this section.

(c) Except to the extent provided in paragraph (b) changes in place of residence subsequent to the initial changes caused by coordination and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 11 (a). The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of any of the carriers involved in a particular coordination (or who is later restored to such service from the group of employees entitled to receive a coordination allowance) who is required to change the point of his employment as a result of such coordination and is therefore required to move his place of residence:

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the coordination to be unaffected thereby. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party.
2. If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by coordination and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this Section.

(c) No claim for loss shall be paid under the provisions of this section which is not presented within three years after the effective date of the coordination.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the carrier on whose line the controversy arises and in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and the carrier, respectively; these two shall endeavor by agreement within ten days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser, and in the event of failure to agree then the Chairman of the Interstate Commerce Commission shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 12. If any carrier shall rearrange or adjust its forces in anticipation of a coordination, with the purpose or effect of depriving an employee of benefits to which he should be entitled under this agreement as an employee immediately affected by a coordination, this agreement shall apply to such an employee as of the date when he is so affected.

Section 13. In the event that any dispute or controversy arises (except as defined in Section 11) in connection with a particular coordination, including an interpretation, application or enforcement of any of the provisions of this agreement (or of the agreement entered into between the carriers and the representatives of the employees relating to said coordination as contemplated by this agreement) which is not composed by the parties thereto within thirty days after same arises, it may be referred by either party for consideration and determination to a Committee which is hereby established, composed in the first instance of the signatories to this agreement. Each party to this agreement may name such persons from time to time as each party desires to serve on such Committee as its representatives in substitution for such original members. Should the Committee be unable to agree, it shall select a neutral referee and in the event it is

unable to agree within 10 days upon the selection of said referee, then the members on either side may request the National Mediation Board to appoint a referee. The case shall again be considered by the Committee and the referee and the decision of the referee shall be final and conclusive. The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

Section 14. Any carrier not initially a party to this agreement may become a party by serving notice of its desire to do so by mail upon the members of the Committee established by Section 13 hereof. It shall become a party as of the date of the service of such notice or upon such later date as may be specified therein.

Section 15. This agreement shall be effective June 18, 1936, and be in full force and effect for a period of five years from that date and continue in effect thereafter with the privilege that any carrier or organization party hereto may then withdraw from the agreement after one year from having served notice of its intention so to withdraw; provided, however, that any rights of the parties hereto or of individuals established and fixed during the term of this agreement shall continue in full force and effect, notwithstanding the expiration of the agreement or the exercise by a carrier or an organization of the right to withdraw therefrom.

This agreement shall be subject to revision by mutual agreement of the parties hereto at any time, but only after the serving of a sixty (60) days notice by either party upon the other.

For the participating carriers listed in Appendix A:

H. A. Enoch Geo. D. Walton W. W. White

For the participating carriers listed in Appendix B:

L. A. Clements E. J. Cannon C. M. Fluker

For the participating carriers listed in Appendix C:

H. A. Benton W. J. Jenkins J. S. Lanier

For the participating carriers:

H. A. Enoch

Chairman, Joint Conference Committee.

For the participating organizations of employees:

A. Johnston by W. J. B.

Grand Chief Engineer, Brotherhood of Locomotive Engineers.

President, Brotherhood of Locomotive Firemen and Enginemen.

President, Order of Railway Conductors of America.

President, Brotherhood of Railroad Trainmen.

President, Switchmen's Union of North America.

President, Order of Railroad Telegraphers.

President, American Train Dispatchers' Association.

President, International Association of Machinists.

President, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America.

President, International Brotherhood of Blacksmiths, Drop Forgers and Helpers.

President, Sheet Metal Workers' International Association.

Vice-President, International Brotherhood of Electrical Workers.

Felix. J. Knight

President, Brotherhood Railway Carmen of America.

J. F. Mc Namara

President, International Brotherhood of Firemen and Oilers.

A. H. Fjozdal

President, Brotherhood of Maintenance of Way Employes.

Geo. M. Harrison

President, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

A. F. Lyon

Acting President, Brotherhood of Railroad Signalmen of America.

M S Warfield

President, Order of Sleeping Car Conductors.

James J. Delaney

President, National Organization Masters, Mates & Pilots of America.

Wm. L. Braun

President, National Marine Engineers' Beneficial Association.

International Longshoremen's Association.

Geo. M. Harrison

Chairman, Railway Labor Executives' Association.

Signed at Washington, D. C.
May 21, 1936.

APPENDIX A

LIST OF CARRIERS IN EASTERN TERRITORY PARTIES TO AGREEMENT

Carrier (1)	Properties and Operations included in the authorization as part of, and to be considered as part of, the carrier listed in Column 1. (2)
Ann Arbor Baltimore & Ohio Bessemer & Lake Erie Boston & Maine Boston Terminal Central R. R. of N. J. Cincinnati Union Terminal Co. Chicago, Indianapolis & Louisville Chicago River and Indiana Cleveland Union Terminals Co. Dayton Union Delaware, Lackawanna & Western Detroit & Toledo Shore Line Detroit Terminal Detroit, Toledo & Ironton	
Erie	Chicago & Erie; New Jersey & New York; New York, Susquehanna & Western
Indianapolis Union Indiana Harbor Belt Lehigh & Hudson River Lehigh & New England Lehigh Valley Long Island Maine Central Monongahela	
The New York Central Railroad Company	All leased lines.
New York, Chicago & St. Louis New York, New Haven & Hartford	
Pennsylvania	Waynesburg & Washington; Balto. & Eastern
Penna.-Reading Seashore Lines Pere Marquette	
Pittsburgh & Lake Erie	Lake Erie and Eastern
Portland Terminal Co. Railway Express Agency, Inc. Reading Rutland Staten Island Rapid Transit Washington Terminal Western Maryland	
Wheeling & Lake Erie	Lorain & West Virginia

NOTE: Agreement subject to approval of court with respect to lines in hands of Receivers or Trustees.

APPENDIX B

LIST OF CARRIERS IN WESTERN TERRITORY PARTIES TO AGREEMENT

Carrier (1)	Properties and Operations included in the authorization as part of, and to be considered as part of, the carrier listed in Column 1. (2)
Alameda Belt Line Alton & Southern R. R. Alton Railroad Co., The	
Atchison, Topeka & Santa Fe Ry. Co., The	Gulf, Colorado & Santa Fe Ry. Co., Panhandle & Santa Fe Ry. Co.
Atchison Union Railway & Depot Co. Baltimore & Ohio Chicago Terminal R. R. Co., The Belt Railway Company of Chicago Burlington-Rock Island R. R. Co. Camas Prairie R. R. Co. Chicago & Eastern Illinois Ry. Co. Chicago & Illinois Midland Ry. Co. Chicago & North Western Ry. Co. Chicago & Western Indiana R. R. Co.	
Chicago, Burlington & Quincy R. R. Co.	Quincy, Omaha & Kansas City R.R.
Chicago, Milwaukee, St. Paul & Pacific R. R. Co.	Chicago, Terre Haute & Southeastern Ry. Co.
Chicago, Rock Island & Pacific Ry. Co., The	Chicago, Rock Island & Gulf Ry. Co., Peoria Terminal Co.
Chicago, St. Paul, Minneapolis & Omaha Ry. Co. Chicago Union Station Co. Colorado & Southern Ry. Co. Davenport, Rock Island & Northwestern Ry. Co. Denver & Rio Grande Western R. R. Co., The Denver & Salt Lake Ry. Co., The Denver Union Terminal Ry. Co., The	
Des Moines Union Ry. Co.	Iowa Railway Transfer Co.
Duluth, Missabe & Northern Ry.	Duluth & Iron Range R.R.
Duluth, South Shore & Atlantic Ry. Co.	Mineral Range R.R. Co.
East Portland Freight Terminal East St. Louis Junction R. R. Elgin, Joliet & Eastern Ry. Co. Fort Smith & Western Ry.	
Fort Worth & Denver City Ry. Co.	Wichita Valley Ry. Co., The

NOTE: Agreement subject to approval of court with respect to lines in hands of Receivers or Trustees.

APPENDIX B (Continued)

LIST OF CARRIERS IN WESTERN TERRITORY PARTIES TO AGREEMENT

Carrier (1)	Properties and Operations included in the authorization as part of, and to be considered as part of, the carrier listed in Column 1. (2)
Fort Worth Belt Ry. Co. Galveston, Houston & Henderson R. R. Great Northern Ry. Co. Green Bay & Western R. R. Co.	
Gulf Coast Lines	New Orleans, Texas & Mexico Ry. Co., St. Louis, Brownsville & Mexico Ry. Co., Beaumont, Sour Lake & Western Ry. Co., Houston & Brazos Valley Ry. Co., San Antonio, Uvalde & Gulf R.R. Co., Sugar Land Ry. Co., Rio Grande City Ry. Co., Asherton & Gulf Ry. Co., Asphalt Belt Ry. Co., San Antonio Southern Ry. Co., San Benito & Rio Grande Valley Ry. Co., Orange & Northwestern R.R. Co., New Iberia & Northern R.R. Co., Iberia, St. Mary & Eastern R.R. Co.
Houston Belt & Terminal Ry. Co. International-Great Northern R. R. Kansas City Terminal Ry. Co. Kansas, Oklahoma & Gulf Ry. Co. Lake Superior & Ishpeming R. R. Co. Litchfield & Madison Ry. Co. Manufacturers Ry. Co. (St. Louis) Midland Valley R. R. Co. Minneapolis, St. Paul & Saulte Ste. Marie Ry. Co.	
Minneapolis & St. Louis R. R. Co., The	Railway Transfer Co. of the City of Minneapolis
Minnesota Transfer Railway Co., The	
Minnesota & International Ry. Co.	Big Fork & International Falls Ry. Co.
Missouri-Illinois R. R. Co.	
Missouri-Kansas-Texas R. R. Co.	Missouri-Kansas-Texas R.R. Co. of Texas, Texas Central R.R. Co., The Wichita Falls Ry. Co., The Wichita Falls & Northwestern Ry. of Texas, Wichita Falls & Wellington Ry. Co. of Texas, Beaver, Meade & Englewood R.R.
Missouri Pacific R. R. Co.	Missouri Pacific R.R. Corporation in Nebraska, Fort Smith Suburban Ry., Natchez & Southern Ry., Natchez & Louisiana Ry. Transfer Co. (Boat), The Chester & Mt. Vernon R.R., Booneville, St. Louis & Southern Ry. Co., Cairo & Thebes R.R. Co., Marion & Eastern R.R. Co.
Northern Pacific Ry. Co. Northern Pacific Terminal Co. of Oregon, The Northwestern Pacific R. R. Co. Ogden Union Ry. & Depot Co.	

NOTE: Agreement subject to approval of court with respect to lines in hands of Receivers or Trustees.

APPENDIX B (Continued)

LIST OF CARRIERS IN WESTERN TERRITORY PARTIES TO AGREEMENT

Carrier (1)	Properties and Operations included in the authorization as part of, and to be considered as part of, the carrier listed in Column 1. (2)
Oklahoma City-Ada-Atoka Ry. Co. Oregon, California & Eastern Ry. Co. Peoria & Pekin Union Ry. Co. Port Terminal Railroad Association (Houston) Pueblo Union Depot & Railroad Co., The Railway Express Agency, Inc. Rock Island-Frisco Terminal Ry. Co. St. Joseph Terminal R. R. Co. St. Joseph Union Depot Co. St. Paul Union Depot Co., The St. Louis & O'Fallon Ry. Co.	
St. Louis-San Francisco Ry. Co.	St. Louis-San Francisco & Texas Ry., Ft. Worth & Rio Grande Ry., Birmingham Belt R.R. Co.
St. Louis Southwestern Ry. Co.	St. Louis Southwestern Ry. Co. of Texas, Dallas Terminal Ry. & Union Depot Co.
Salt Lake City Union Depot & R. R. Co., The San Diego & Arizona Eastern Ry. Co. Sioux City Terminal Ry. Co. South Omaha Terminal Ry. Co. Southern Pacific Company-Pacific Lines	
Spokane, Portland & Seattle Ry. Co.	Oregon Trunk Ry., Oregon Electric Ry. Co., United Railways Co.
Spokane, Couer d'Alene & Palouse Ry. Co. Spokane International Ry.	
Terminal Railroad Ass'n. of St. Louis	St. Louis Merchants Bridge Terminal Ry., East St. Louis Connecting Ry., St. Louis Transfer Ry.
Texas & Pacific Ry., The	Weatherford, Mineral Wells & Northwestern Ry. Co., The, Texas-New Mexico Ry. Co., Abilene & Southern Ry. Co., Texas Short Line Ry., Pecos Valley Southern Ry. Co., The, Cisco & Northeastern Ry. Co.
Texas Pacific-Missouri Pacific Terminal R. R. of New Orleans	
Texas & New Orleans R. R. Co.	Galveston, Harrisburg & San Antonio Ry. Co., The, Texas & New Orleans R.R. Co., Louisiana Western R.R. Co., Morgan's Louisiana & Texas R.R. & S.S. Co., Iberia & Vermillion R.R. Co., Houston & Texas Central R.R. Co., The, Texas Midland R.R., Galveston, Harrisburg & San Antonio Ry. Co., The (Austin Div.), Houston, East & West Texas R.R. Co., The, Houston & Shreveport R.R. Co.

NOTE: Agreement subject to approval of court with respect to lines in hands of Receivers or Trustees.

APPENDIX B (Continued)
LIST OF CARRIERS IN WESTERN TERRITORY PARTIES TO AGREEMENT

Carrier (1)	Properties and Operations included in the authorization as part of, and to be considered as part of, the carrier listed in Column 1. (2)
Tidewater Southern Ry. Co. Tulsa Union Depot Co. Union Railway Co. (Memphis, Tenn.)	
Union Pacific R. R.	Eastern District, Central District, Northwestern District, Southwestern District.
Union Terminal Co. (Dallas, Tex.) Union Terminal Ry. Co. (St. Joseph, Mo.) Wabash Ry. Co. Western Pacific R. R. Co., The Wichita Union Terminal Ry. Co., The	

NOTE: Agreement subject to approval of court with respect to lines in hands of Receivers or Trustees.

APPENDIX C

LIST OF CARRIERS IN SOUTHEASTERN TERRITORY PARTIES TO AGREEMENT

Carrier (1)	Properties and Operations included in the authorization as part of, and to be considered as part of, the carrier listed in Column 1. (2)
Central of Georgia Railway	
Chesapeake & Ohio Railway	
Columbus & Greenville	
Illinois Central System	
Macon, Dublin and Savannah	
Norfolk & Western Railway Company	
Norfolk Southern Railway Company	
Railway Express Agency, Inc.	
Richmond, Fredericksburg & Potomac	
Seaboard Air Line Railway	
Travares and Gulf	
Virginian	

NOTE: Agreement subject to approval of court with respect to lines in hands of Receivers or Trustees.

Carriers which have become parties of the "Agreement of May, 1936. Washington, D. C." by service of notice in accordance with Section 14.

Appendix A—Eastern Territory

	Effective Date
Akron, Canton and Youngstown Railroad Company	6-16-36
Akron Union Passenger Depot Company	8- 4-50
Bangor and Aroostook Railroad Company	6- 1-48
Brooklyn Eastern District Terminal	12 -6-60
Buffalo Creek Railroad	6- 1-36
Canadian National Railways. Central Region Lines in U. S.	4- 1-51
Canton Railroad Company	6-20-60
Central Vermont Railway	3-11-37
Chicago and Calumet River Railroad Company	11- 2-50
Chicago, West Pullman and Southern Railroad Company	10- 1-50
Detroit and Mackinac Railway Company	11-15-47
Fort Street Union Depot Company, The	12- 6-48
Grand Trunk Western Railroad Company	11- 5-36
Lehigh & New England Railway Company	11-13-61
Manistee and Northeastern Railway Company	12- 6-48
Montour Railroad Company	8- 6-51
New York Connecting Railroad Company	5- 1-48
Pittsburgh and West Virginia Railway	6- 8-36
Pittsburgh, Chartiers and Youghiogheny Railway Company	10- 2-50
Pullman Company, The	3-12-52
Toledo Terminal Railroad Company	9- 9-44
Troy Union Railroad Company, The	11-15-40
Union Belt of Detroit	12-21-48
Union Depot Company, Columbus, Ohio	5-26-36
Union Freight Railroad Company (Boston)	5- 1-48
Youngstown and Northern Railroad Company	5- 5-49
Youngstown and Southern Railway Company	8- 6-51

Appendix B—Western Territory

Ashley, Drew & Northern Railway Co.	11-17-48
Chicago Great Western Railway Co.	1- 1-42
Chicago North Shore & Milwaukee Railway Co.	10-29-51
Chicago South Shore & South Bend R. R.	7-15-42
Colorado & Wyoming Railway Co.	4-18-49
Duluth Union Depot and Transfer Co.	3-27-52
Duluth, Winnipeg & Pacific Railway Co.	12-11-36
El Paso Union Passenger Depot Co.	12-26-47
Fort Dodge, Des Moines & Southern Ry. Co.	9-18-53
Harbor Belt Line Railroad	9-27-49
Illinois Northern Railway	4-12-55

Appendix B — Western Territory	*Effective Date*
Illinois Terminal Railroad Co.	2- 6-47
Kansas City Southern Railway Co.	1-11-39
Kewaunee, Green Bay & Western R. R. Co.	7-29-48
Lake Superior Terminal & Transfer Ry. Co.	5-18-48
Louisiana & Arkansas Railway Co.	1-11-39
Louisiana, Arkansas & Texas Railway Co.	1-11-39
Minneapolis, Northfield & Southern Railway	9- 4-36
Minnesota Western Railway Co.	9- 4-36
Oakland Terminal Railway	6-12-48
Pacific Coast Railroad Co.	6- 7-48
Pacific Electric Railway Co.	8-13-42
Pullman Company, The	3-12-52
Sacramento Northern Railway	4-29-40
Sand Springs Railway Co.	1- 1-48
Spokane Union Station	5- 8-48
Texarkana Union Station Trust	1-17-48
Texas City Terminal Railway Co.	2- 4-52
Texas Mexican Railway Co.	11-14-50
Toledo, Peoria & Western Railroad	11-19-47
Waterloo Railroad Co.	11- 1-68
Appendix C—Southeastern Territory	
Albany Passenger Terminal Co.	4- 1-49
Atlanta, Birmingham & Coast Railroad Co.	4-24-44
Atlanta Joint Terminals	11- 1-41
Atlanta Terminal Company	11- 4-48
Atlanta & West Point R. R. Co. — Western Ry. of Alabama	7- 7-44
Atlantic Coast Line Railroad Co.	7- 8-39
Augusta Union Station Co.	7- 7-44
Birmingham Terminal Company	2-11-49
Blue Ridge Railway Company	11-20-48
Carolina and Northwestern Railway Co.	11-20-48
Charleston & Western Carolina Railway Co.	11-24-39
Chattanooga Station Company	2-11-49
Chattanooga Traction Co.	11-20-48
Clinchfield Railroad Co.	10- 1-39
Columbia Union Station Co.	2-11-49
Danville and Western Railway Co.	11-20-48
Durham Union Station Co.	2-11-49
Florida East Coast Railway	10- 1-39
Georgia Railroad	7- 7-44
Georgia & Florida Railroad	7- 6-54
Goldsboro Union Station Company	5-24-49
Gulf, Mobile & Northern Railroad Co.	1-30-39
Gulf, Mobile & Ohio Railroad Co.	1-30-39

	Effective Date
High Point, Randleman, Asheboro and Southern R. R. Co.	11-20-48
Jacksonville Terminal Company	4-26-49
Kentucky & Indiana Terminal Railroad Co.	7-30-46
Louisville & Nashville Railroad Co.	2-10-42
Macon Terminal Company	4- 1-49
Memphis Union Station Company	12-22-48
Meridian Terminal Company	2-11-49
Mississippi Central Railroad Company	10- 1-65
Nashville, Chattanooga & St. Louis Railway	8- 8-46
New Orleans Public Belt Railroad	11-22-40
Norfolk & Portsmouth Belt Line Railroad Co.	12- 1-49
Norfolk Terminal Railway Co.	11- 1-47
Pullman Company, The	3-12-52
Richmond Terminal Railway Co.	10- 7-47
Savannah & Atlanta Railway Company	12- 6-48
Southern Railway System	3- 1-40
Tampa Union Station Company	11-30-48
Tennessee Central Railway Co.	6-14-50
Winston-Salem Terminal Company	2-11-49
Yadkin Railroad Co.	11-20-48

The above list of additional carriers is as of November 1, 1968 when this printing of the agreement was prepared.

The Cotton Belt applied to the Interstate Commerce Commission for permission to install the devices at issue and the Bridge Company was made a party to the application. It is quite clear that The Cotton Belt was required to obtain approval, but nothing in the record demonstrates that the Bridge Company was required to join as a carrier of the class specified in the agreement.

The Organization argues in the alternative that the change was a "coordination" of facilities of The Cotton Belt and The Missouri Pacific. However, that coordination--including formation of the Bridge Company is--many decades old. The control and switch and traffic arrangements were of long standing and no new combination was effected. The modernization of long-integrated facilities does not constitute a "coordination". The shift of location of the control device does not change the fact that the coordination of facilities had been effectuated long before. That element did not turn the modernization into a new and additional coordination.

DECISION: The extension of the Central Traffic Control System of the St. Louis Southwestern Railway Company as a substitute for certain traffic control devices of the Southern Illinois & Missouri Bridge Company, already integrated with the former's facilities, was not a "coordination".

DOCKET NO. 70 -- Decision by Referee Bernstein

Southern Pacific Company (Pacific Lines) and Pacific Electric Railway Company	)	
vs.	)	PARTIES TO DISPUTE
Brotherhood of Railroad Trainmen	)	
Brotherhood of Locomotive Engineers	)	
Brotherhood of Locomotive Firemen & Enginemen, and Order of Railway Conductors and Brakemen	)	

QUESTION: (1) Would the arrangement described in the facts which follow constitute a "coordination" within the meaning of Section 2 (a) of the Agreement of May, 1936, Washington, D. C.?

(2) If the answer to Question No. 1 is affirmative, may the carriers involved place the coordination in effect prior to the time that an agreement comprehended by Section 5 of the Washington Agreement has actually been reached between the carriers and the organizations of the employees affected; provided not less than ninety (90) days have elapsed from date of written notice served and posted in accordance with Section 4 of the Washington Agreement; and provided further, that conference (conferences) have been held upon the basis prescribed in Sections 4 and 5 of the Washington Agreement and the parties have reached an impasse?

FINDINGS: (a) Pacific Electric owns and operates a three mile line of railroad which is not connected with other parts of that Carrier but is physically connected with Southern Pacific. Pacific Electric equipment and employees operate on its own track picking up cars, which enter from Southern Pacific track, from interchange tracks.

Pacific Electric & Southern Pacific desire to have Southern Pacific employees conduct the operations on Pacific Electric's three miles of line. The Carriers contend that this is a coordination made permissible by the Washington Job Protection Agreement. They are willing to apply the protective conditions to all adversely affected employees.

The Organizations contend that the proposed combination is not a "coordination" because it is the combination of unlike things, and hence is not made possible by the Washington Agreement. (See Docket No. 5?, below).

Section 2 (a) provides:

> "The term coordination as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities."

Nothing in this language restricts "coordination" to the combination of like things, although that might be the kind of combination most anticipated. The combining of one carrier's facilities and/or services with another carrier's personnel is no less a "merging" or "pooling" than the combining of the same of different kinds of facilities and/or services. Many ordinary coordinations require the combination of "facilities" and employees in order to render "services" -- both categories covered by Section 2 (a). Indeed, it is a commonplace of coordinations for employees of one carrier to operate over the trackage of another. This is combination of unlike categories, but can be a "coordination" nonetheless.

It follows that the Carriers' proposed integration is a "coordination".

(b) The second question presented is: If the notice and conference provisions of Section 4 are carried out fully and in good faith, does Section 5 require an agreement of the parties as a condition of putting a coordination into effect; and failing to agree, is the only recourse to the Section 13 Committee for a resolution of the impasse and directions for putting the coordination into effect?

Section 5 of the agreement provides:

> "Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

A literal reading of Section 5 seems to require an agreement as an absolute condition. It says: ". . . and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement. . ." Only one alternative is given:

"In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

Such an interpretation is consistent with the scheme of the Railway Labor Act which requires that any changes in the rules agreements may be put into effect only after following the procedures of the Act. They can be lengthy, but nonetheless a unilateral change cannot be made by either carriers or employees until the procedures are fully observed.

As pointed out in argument, the Washington Job Protection Agreement permits changes by carriers in work assignment that are not possible under rules agreements. But there is nothing in the Agreement which indicates or hints that such changes can be introduced through unilateral action not permitted by the rules agreements.

If the element of delay seems to strengthen the hand of an obdurate party, the way is open to invoke the powers of the Section 13 Committee which has in the past directed the proper basis for implementing coordinations. E.g., See Docket No. 4.

The Committee was not asked to decide the merits of the work assignment dispute.

DECISION: (a) The proposed change of operations whereby The Southern Pacific Company's employees would operate equipment of the Pacific Electric Railway Company over the latter's tracks is a "coordination."

(b) The Agreement does not permit the unilateral effectuation of a coordination plan without an agreement between the Carriers and the representatives of the employees affected. Failing agreement, the proper procedure is recourse to the Section 13 Committee.

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RESUBMITTED DOCKET NO. 70 --- Decision by Referee Coffey

Southern Pacific Company (Pacific Lines) and	)	
Pacific Electric Railway Company	)	
vs.	)	PARTIES TO DISPUTE
Brotherhood of Locomotive Engineers	)	
Brotherhood of Railroad Trainmen	)	
Brotherhood of Locomotive Firemen and Enginemen	)	
Order of Railway Conductors and Brakemen	)	

QUESTION: Referee Bernstein in Award issued June 7, 1961 provided as follows:
"The Agreement does not permit the unilateral effectuation of a coordination plan without an agreement between carriers and the representatives of the employees affected. Failing agreement, the proper procedure is recourse to the Section 13 Committee."

No agreement having been reached, Carriers resubmit.

FINDINGS: The parties hereto are signatories to the Agreement of May, 1936, Washington, D. C. (Washington Job Protection Agreement)

On the basis of the entire record, all of the evidence and reasonable inferences, I find and determine that:

The Bernstein Award, referred to above, further held "that the Carriers' proposed integration is a 'coordination'" within the meaning of Section 2(a) of the Agreement, supra.

That decision is final and binding on the parties to this dispute, as provided in Section 13 of said Agreement.

Accordingly, said decision cannot now be collaterally attacked to divest this Committee of its continuing jurisdiction to settle and adjust an unresolved dispute involving failure of the parties to agree on "a plan of coordination" as contemplated by Section 5 of said Washington Agreement for making the particular "coordination" effective.

DECISION: Carriers' proposed Implementing Agreement (Exhibit No. 2, Carriers' ex parte resubmission) is in all things appropriate as a basis for making the changes consequent upon "coordination" effective without further delays, except for some possible failure to show proper recognition for the equity that the employees of the Pacific Electric have in the service that is being transferred to the Southern Pacific Company (Pacific Lines).

In the submissions and on oral argument, the representatives of the employees principally urged and emphasized that this Committee should reverse its previous decision, with Referee Bernstein participating, and did not indicate that they were insisting upon the Pacific Electric employees participating in the coordinated operation. Also, the record does not show the employees of the Pacific Electric have requested that the proposed agreement provide for their participation in the coordination operation.

Nevertheless, the very heart of the Agreement of May, 1936, Washington, D.C. is the equitable consideration that each plan of "coordination" which results in the displacement of employees or rearrangement of forces, shall provide for the selection of forces from the employees of all the Carriers involved on the basis deemed appropriate for application in the particular case.

On the other hand, the work that is being transferred in the instant case is, in some degree, seasonal and, at most, would hardly sustain a full crew or crews if arrangements were made for them to follow the work.

Moreover, the Pacific Electric employees could not possibly go to the Southern Pacific Company and enjoy the same seniority rules which they presently are enjoying. Nor could they enjoy the same rates of pay. Pacific Electric employees are under yard rates of pay and the Southern Pacific employees involved are under road rates of pay.

It is also a matter of record that, despite repeated attempts on the part of carriers to permit the organizations to do so, no attempt has been made by them to determine participation between the employees of the two Carriers involved in the coordinated operation, a fact from which I am compelled to draw the inference that the Pacific Electric employees are not interested in following the work.

This is not hard to understand on a record which shows that Pacific Electric employees would have much to lose and practically nothing to gain in that connection.

Reasoned as above and the further fact that any of the Pacific Electric employees who may be adversely affected would be fully protected under the provisions of the Washington Job Protection Agreement. I am of the opinion that the equities they have in the work are thereby fully protected.

Upon continued failure of the parties to agree, within thirty days from the receipt hereof, upon an appropriate basis for selection and assignment of forces from among participating Carriers, the "coordination" may thereafter be made effective on terms that are being proposed by Carriers.

Further negotiations thereafter are dependent upon the due processes of law, contract, or for making other changes in rules, practices and rates of pay by mutual consent.

Agreement of May, 1936, Washington, D. C.
(Washington Job Protection Agreement)

Committee Established Under Section 13
Referee's Findings and Decisions
Dated Chicago, Illinois, March 19, 1963
(A. Langley Coffey, Referee)

Dockets 70 (Resubmitted), 71, 73, 74, 75, 78, 79,
88, 89, 90, 92, 95, 98, 99, 100.

GENERAL DISSENT

The comments and decisions of the Referee in this docket of cases are so foreign to the literal reading the purposes and intent of the Agreement of May, 1936, Washington, D. C., commonly known as the Washington Job Protection Agreement, that the employee representatives of the Section 13 Committee, although many of them do not approve of the filing of dissents in normal cases, feel so strongly in connection with these decisions that they unanimously decided that it was necessary to file a vigorous general dissent in this docket of cases and they also agree with the dissents filed in the individual cases, namely Dockets 70, 90 and 98 and Dockets 73, 92, 95 and 100. Dissents could very well be filed in several other cases in this docket but the individual dissents we are filing are limited to the glaring mistakes which the Referee made.

We realize that this Agreement was written 27 years ago and by practical railroad men - laymen if you please - and it means what it says. Its purposes are spelled out and its benefit provisions are sufficiently clear for practical railroad men to know what they mean. A case does arise occasionally which the Agreement may not cover clearly but there were only two such cases in this docket. It was intended that the Agreement be interpreted by laymen not by legalistic minds which through mental gymnastics can make white turn into black.

It was apparent during the course of the hearings and discussions that the Referee did not understand the Agreement nor its purposes even though it was explained in detail and on numerous occasions. It would appear that the Referee determined what he believed would be equitable in his own judgment and evaluation of the cases regardless of the Agreement provisions and then twisted the provisions of the Agreement to justify his determinations.

Some of his decisions exceed the authority of the Section 13 Committee. In other cases where the provisions of the Agreement sustained the contention of the employees, he said he did not believe the Agreement was intended to function in that manner. In still other cases he added words to the Agreement and then interpreted the Agreement with his words added. In my forty years' experience as a negotiator and interpreter of agreements, I have never seen any agreement mutilated to the extent the Washington Job Protection Agreement has been mutilated by this Referee. The dissents on individual cases follow the docket on which dissent has been filed.

This general dissent and the individual dissents have been unanimously adopted by the employee members of the Section 13 Committee.

G. E. Leighty

Chairman
Employee Members Section 13 Committee
Agreement of May, 1936, Washington, D.C.

St. Louis, Missouri
October 14, 1963

DISSENT - RESUBMITTED DOCKET NO. 70

STATEMENT OF FACTS: Page 3 of the Carriers' brief dated January 15, 1962, contains the following description of Resubmitted Docket No. 70:

> "Now therefore, in Sections 5 and 13 of said Agreement of May 1936, and pursuant to paragraph (b) of award under Docket No. 70 of the above entitled Committee, the Carriers respectfully request that the said Committee direct the proper basis and conditions under which the proposed coordination shall be permitted to be made effective."

On pages 6 and 7 of the Carriers' supplementary brief handed Referee A. Langley Coffey on December 11, 1962, somewhat different issues are described:

"Reduced to its simplest terms, your assignment is basically to:

(a) Interpret the provisions of Section 5 of the Washington Agreement to clarify the question as to whether Section 5 contemplates and is limited to an agreement covering assignment of employees only, or an agreement covering assignment of employees and the rates of pay, rules and working conditions attached to such employees."

Section 5 of the WJPA provides that:

"Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto. In event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13." (Underscoring added).

DISSENTING OPINION: In Carriers' brief of January 15, 1962, a plea was entered urging that the Section 13 Committee "direct the proper basis and conditions under which the proposed coordination shall be permitted to be made effective." (Underscoring added).

On December 11, 1962, after considering various and devious means to confuse the record, the Carriers then changed the disputed issues of January 11, 1962, and requested Referee A. Langley Coffey to "interpret Section 5 of the Washington Agreement to clarify the question as to whether Section 5 contemplates and is limited to an agreement covering assignment of employees only, or an agreement covering assignment of employees and the rates of pay, rules and working conditions attached to such employees." By a clever play on words the Carriers then attempt to further confuse the record by charging the Organizations with abortive attempts to expand the scope of an agreement under Section 5 to include rules, rates and working conditions. Carriers allege and admit that changes in rules, rates and working conditions can only be accomplished through the processes of the Railway Labor Act. With this, the Organizations agree as evidenced by the formal Section 6 Notices referred to in the record.

A realistic evaluation of the situation should readily convince even the most skeptic that a "coordination" of this type would require agreement on other rule changes in addition to the allocation of forces. For example, Pacific Electric operating yard service employees have contractual and exclusive rights to perform all switching service on the San Fernando Branch. On the other hand, Southern Pacific employees, who will be required to switch the San Fernando Branch under the Carriers' proposed plan of operations, are road crews paid on a mileage basis and have no contractual obligation to perform yard service on a foreign carrier without an additional day's compensation. To contend that yard service under contract to one group of employees can be arbitrarily transferred to road crews of

another carrier through the media of the WJPA without changes in other existing rules, would do violence to the required procedures of the Railway Labor Act. (See Findings and Conclusions of the United States District Court for the District of Columbia dated May 14, 1963 - Civil Action No. 2881-62-BLF&E vs. Southern Ry. et al).

From Carriers' "Exhibit No. 1" attached to and made a part of the supplementary brief handed Referee Coffey on December 11, 1962, it is interesting to note that the Carriers' plan for "assignment of employees" of "all Carriers involved" contemplates that:

> "4. Concurrent with the effective date of coordination, work now performed by Pacific Electric freight crews on Pacific Electric San Fernando Branch will be performed by Southern Pacific crews in accordance with existing Southern Pacific rules and practices governing the operating territory involved."
>
> "5. Concurrent with the effective date of the coordination, Pacific Electric freight assignments now established to perform work on Pacific Electric San Fernando Branch will be abolished and Pacific Electric employees affected thereby shall exercise seniority in accordance with applicable provisions of the working Agreements in effect between the Pacific Electric and its employees represented by the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen."

Despite the persuasive arguments advanced by the Carriers, reason makes it next to impossible to arrive at the conclusion that the foregoing proposed agreement covers an appropriate "assignment of all carriers involved". Perhaps a more accurate description of the proposed agreement could appropriately be termed as an "arbitrary transfer of work from one group of employees to another." Section 5 of the WJPA patently preserves the contractual right of employees to follow their work and participate in the "coordinated" operations. Any other construction would render the WJPA meaningless.

Items 4 and 5 of Carriers' Exhibit No. 1, herein quoted, amply illustrate the ambiguity of their December 11, 1962 amended position. Pseudo agreements are therein advanced imploring the Referee to hold that any agreement under Section 5 of the WJPA must deal solely with the "allocation of forces", and does not require changes in "rules, rates and working conditions". Further, that such rule changes, if considered at all by the Carriers, must be handled by the Employees in accordance with the procedures of the Railway Labor Act, separate and apart from the instant proceedings. While the Organizations do not entirely disagree with such theory, it must be said with certainty that Items 4 and 5 of Carriers' Exhibit No. 1 are designed to combine "allocation of forces" with "rules, rates and working conditions".

In summary, the BLF&E feels that the Referee in deciding Resumbitted Docket No. 70 on March 19, 1963, exceeded the authority vested in him under Section 13 by writing new rules never contemplated by the original framers of the WJPA. Further, that such new rules violate the principles of the Railway Labor Act and border on compulsory servitude. Candor compels the conclusion that the Referee either did not read the record or is incapable of serving in an unbiased capacity. Therefore, the BLF&E desires to protest with all the vehemence at our command.

normal collective bargaining agreement which granted a long standing demand of the Employees and, in return, permitted the Carrier (with some minor exceptions for the protection of employees) to apply one set of rules to former employees of both carriers. While the provision in this second agreement to provide cooks for system signal gangs obviously is a routine bargaining matter, it does not change the character of the other portion of the agreement dealing with the L&N rules described by the Carrier as one intimately related with the merger; indeed, this latter change was a further step in putting together the work of former L&N and former N.C.&St.L. employees. And, as the Carrier's brief declares, the third agreement (Exhibit C) was "connected with and a part of collective bargaining agreement Carrier's Exhibit B." (Carrier's Answer, p.2 and a similar statement on p. 12.) Exhibit C need not be for the Carrier's benefit in order to make it a step in effectuation of the merger.

Inasmuch as the Claimant's displacement came about through the operation of the third agreement (Carrier's Exhibit C), it follows that it was a result of the coordination and the Claimant is eligible for the benefits of the Washington Agreement.

The Carrier's contention that the protective period of the New Orleans Conditions for this employee had ended prior to his displacement because it could extend beyond the effective date of the merger only for a time equal to his pre-coordination service is without merit. That issue is dealt with in the opinion in Docket No. 133.

DECISION: Claimant Grant was displaced from his position as a result of a coordination and therefore was entitled to the benefits of the Washington Agreement for any period and in amounts in which its total benefits exceeded the total of those under the Oklahoma Conditions.

DOCKET NO. 106 --- Decision by Referee Bernstein

Brotherhood of Railway and Steamship Clerks)
vs.) PARTIES TO DISPUTE
The Baltimore and Ohio Railroad Company)

QUESTION: "Claim of the System Committee of the Brotherhood that:

"(a) The closing of the Baltimore and Ohio, Cincinnati, Ohio City Ticket Office on January 1, 1962, and the transferring of the work involved thereat to the Ticket Office of the Cincinnati Union Terminal Company, is a coordination of separate railroad facilities and subject to the terms and conditions of the Agreement of May 1936, Washington, D. C.

"(b) The Carrier violated the terms and conditions of the Washington Agreement when it failed to furnish a Section 4 notice of intended coordination and failed and refused to apply the terms and conditions of the Agreement for the protection of the employees adversely affected by the coordination.

"(c) The Carrier shall now be required to apply all of the terms and conditions of the Agreement to the coordination involved."

FINDINGS: (a) The Merits

On December 31, 1961 the Carrier, Baltimore and Ohio Railroad Company, closed down its city ticket office (CTO) in Cincinnati. The Organization contends that this shutdown resulted in a shift of the work formerly performed by Carrier employees at CTO to employees of the Cincinnati Union Terminal (CUT), which like the B & O is a signatory of the Washington Agreement. The CUT is a corporation formed by the B & O and several other carriers which continue to own it and direct its affairs. This shift, it is claimed, constitutes a coordination.

Docket No. 68 also involved the shutdown of a city ticket office and the alleged transfer of its work to a union terminal in which the carrier operating the CTO participated as a stockholder. There, as here, a substantial amount of business was handled at the CTO and after its closing the union terminal ticket sales for that carrier increased appreciably. In that earlier case I held that (1) the transfer constituted a consolidation or merger of the operations and services formerly performed at separate facilities; and (2) the union terminal was the result of a joint action which continued so that the augmented business at the union terminal was 'an addition to the past joint action."

An attempt is made to distinguish this case from the situation in Docket No. 68 because there only the terminal ticket office existed to take on the services formerly performed at the CTO whereas here several other B & O ticket offices were operating and continued to operate. However, as the Carrier expected, the bulk of the former sales volume of the CTO in fact showed up in the increased sales at the terminal ticket office. The attempted distinction is insignificant.

In effect the Carrier here seeks to overturn that earlier holding and places reliance upon Docket No. 56. There a CTO was closed and a union terminal ticket office existed. I found "no showing . . . /of_/ any explicit joint action. Nor is there any showing that there was any service performed at the City Ticket Office whose discontinuance there would require any consequent 'action' on the part of the Union Depot." Consequently I held that there was no coordination. A review of the record of that case shows that the Organization made no factual showing of the amount of business transacted prior to the CTO shutdown nor of any immediate increase in business at the union terminal ticket office. Indeed, it made no factual showing except of the shutdown and the existence of the terminal ticket facilities. That earlier case stands for little beyond a failure to show what work had been performed at the CTO or that the discontinuance necessarily involved a shift of services to the joint terminal office. Hence Docket No. 56 provides no basis for overruling Docket No. 68.

Were the CTO and the terminal closed and their former services thereafter performed at a new site by a consortium of the carriers owning the terminal there would be little difficulty in seeing that a coordination of services formerly performed separately had taken place. The fact that the combination occurs at the continuing site of the terminal does not make it any less a unification, consolidation or merger of "operations or services previously performed . . . though . . . separate facilities." The carriers are the B&O and those owning the terminal company. The joint action, in addition to the necessity of the B&O informing the terminal company of its action, consists of the

continuation of the joint enterprise, the terminal company, whose operations are augmented by the additional transfer of B&O work (from the CTO) and its combination with its own services and operations.

The Carrier calls attention to assertedly inconsistent arguments by the Organization in its submission to the Adjustment Board, e.g. the Organization statement:

> It is noted that the Carrier's declining letter does not state that a contract does not exist between the B.&O. and the C.J.T. that is contractual in nature and is in some manner, covered by contract.

This is not inconsistent with the holding in Docket No. 68, which is followed here, that it is the arrangements for operation of the terminal and their continuation that constitute the joint action.

And elsewhere.

> Whether such transfer of work was made through an agreed upon movement between the principal carrier and the servicing carrier, or, as was done here, the forced transfer of service through the elimination of service availability to the patrons, the result is the same. The servicing carrier is, by some agreement or contract, performing service that was formerly performed by the incumbents of the position in the City Ticket Office and to which said incumbents did have, and still retain, [sic] under the provisions of the Clerks' Agreement. The removal of the work was entirely within the control of the Baltimore and Ohio Railroad, the employing party to the agreement, and the agreement was violated in the action taken without prior agreement with the employes.

This is much the same point. It must be remembered that the Organization was stressing the alleged violation of the rules agreement. Assuredly the initiative for the change came from this Carrier and was initially "within the control of the Baltimore and Ohio Railroad." The effectuation of the resulting transfer was the result of joint action.

Even inconsistent arguments cannot change that. Non-lawyers often are shocked by inconsistent theories and arguments and are prone to regard them as admissions if not worse. But one of the great advances of modern procedure is flexibility in argument and presentation of varying theories of a case. In an earlier formalistic period plaintiffs had to do everything "just so" or lose--and mostly they lost. They had to choose one theory of a case no matter how unsettled the law and no matter how the law might become settled while their case wended its often weary way to decision. But procedural reforms have stressed giving all parties what they have coming without undue regard to exactitude of pleading and the purity and consistency of "the" theory on which they proceed. So, inconsistent theories in the same proceeding are specifically permitted in the Federal Rules of Civil Procedure, Rule 8 (e)(2); many state codes follow that by specific rule or decision. Arbitration should not lead a retreat back to the 18th century after gains so arduously won.

(b) Procedure

When this case was presented to the Committee and the Referee it was argued that it was not properly before us because the claim was based upon the same occurrences had been submitted to the Adjustment Board, Third Division. It was argued that the Organization had improperly "split its cause of action" and, having elected to pursue its possible remedy before the Adjustment Board for violation of its rules agreement, it could not press here its alleged violation of the Washington Agreement. However that very statement of the issue shows its lack of comparability to the "splitting cause of action" argument which might be made to a court of general jurisdiction because the claims are different and the two forums have differing jurisdiction.

It is possible for the same action to violate two laws of the same or different jurisdictions. It also is possible for the same act to breach two agreements, even two agreements between the same parties. The transfer of work from Clerks of the B & O to the Clerks of another carrier might violate the rules agreement. The Washington Agreement permits such action if it is taken in conformity with its procedures; when they are not followed, the exception to the rules agreement is not granted and, in addition, the Washington Agreement is independently breached by failure to give the requisite notices and to reach an implementing agreement before putting the coordination into effect.

In order to apply the objection that the Organization is improperly "splitting its cause of action" by proceeding before the Adjustment Board and this Committee, the Organization would have to be able to submit its entire dispute to one or the other. Nor is this a sterile procedural point because the remedies before the Board and the Committee may be different. The Organization could reasonably believe that only if it proceeded in both forums could it be certain to vindicate fully the rights of its members--assuming that violations are proven.

Since the oral argument, the Adjustment Board dismissed the claim on the ground that the same situation was pending here (Docket No. CL-14284). The wisdom of pursuing both courses is thereby demonstrated. For "election of remedies" to foreclose a party the selection must be a conscious choice between inconsistent courses. In view of the uncertainty of what would eventuate in either forum, the Organization and the Claimants can hardly be taxed with having made a preclusive choice, especially where the supposedly inconsistent course has proven remediless.

(c) The Appropriate Remedy

This and several other cases before me present issues of the appropriate remedy in the way of (1) compensation and (2) affirmative orders directing carriers to give the notice and negotiate the implementing agreement required by Sections 4 and 5, respectively, of the Washington Agreement as prerequisites for putting a coordination into effect.

(1) Compensation [1/]

1. Carriers assert that no monetary claim is before the Committee so that this portion of the opinion and the related portion of the decision are improper. But part (c) of the claim asks that the Carrier be required to apply the Agreement. Necessary to such a decision is "how" it is to be applied.

As already noted, a shift of work from employees of one carrier to those of another carrier by outright transfer or combination without observance of the Washington Agreement procedures would violate not only the Washington Agreement but could also violate the rules agreement of the first carrier because the scope rules commonly confer "job ownership" in the covered categories of work in the employees of the contracting carrier represented by the contracting organization. The Organizations argue that this is universally the case; the Carriers argue that there are many exceptions. Suffice it to say that the scope rule in this industry commonly has that effect.

The Adjustment Board determines whether rules have been violated and decides the appropriate remedy. In this case the Adjustment Board declined to reach the merits of the controversy whether the rules agreement was breached by the same transfer involved in this case because of the pendency of this case. This disposition overlooks the possibility that the remedies for violation of the rules agreement and the Washington Agreement may differ. So, if a rules violation were found, the Adjustment Board probably would award a time claim to the incumbents of the jobs immediately affected. However, under the Washington Agreement others who suffered compensation or job loss as a result of the coordination might be entitled to compensation under several different sections of the Washington Agreement.

In this and similar cases this Committee was not asked to determine whether there had been a rules agreement violation nor was evidence presented on that issue, and no finding is or can be made on the record before us that the rules agreement was violated. Nonetheless it is urged that it is appropriate and necessary to compensate employees to put them in the position they would have been in had the coordination not taken place when the Washington Agreement, which specifies the conditions upon which coordinations may be put into operation, has not been observed. The argument has considerable appeal and all the more so because Claimants seeking recompense for alleged violation of the rules agreement are apparently barred from a consideration of their claims on their merits only because the same set of events gave rise to a claim of violation of the Washington Agreement. Although based on different grounds, the remedy for a rules violation and compensation to place all employees in the position they would have been in if the unauthorized coordination had not taken place probably might be the same.[2] If they are to be denied the former because of a companion charge under the Washington Agreement, it would seem appropriate to afford them whatever remedy the Washington Agreement can give. But Carriers argue that such a remedy is essentially the remedy for violation of the rules agreement and such violations are properly the business of the Adjustment Board.

Manifestly claimants should not be driven from both forums with the argument that the other is the proper one and yet be unable to secure full relief

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2. However, some provisions of the Washington Agreement conferring additional protection and benefits might be applicable, e g., those of Section 10.

for all the contract breaches they do prove. It is for the Adjustment Board to pass upon alleged violations of rules agreements and what remedy should flow (with provision for set off to prevent double recoveries - for the aim is compensation, not punishment for wrongdoing). But if a hearing on the merits of such claims cannot be obtained, then similar relief that is based upon the ground that employees should be made whole where they sustain losses due to coordination which breach this Agreement should not be withheld. For that relief does not flow from violation of the rules agreement but is based upon violation of this Agreement. If the Adjustment Board does grant relief, the only objection to similar relief under this Agreement would be a double recovery. Hence in the absence of a compensation award by the Adjustment Board which would be open to that objection, employees are entitled to the difference between their actual earnings from this Carrier and what they would have received if the coordination had not been put into effect until the procedures of this Agreement are followed. The benefits due under Section 6, 7, etc. of the Washington Agreement come into play after Section 4 notices are served and an implementing agreement is reached as required by Section 5.

Carriers argue that the remedy should be limited to whatever payments would have been payable under the Washington Agreement had it been observed. But this would permit Carriers to pay the less than full compensation permitted by the Agreement even though it refused to apply it. In order to claim its advantages, the Carrier must observe the Agreement. Even if it had given the notices it would not be entitled to displace employees and only pay the Agreement's benefits until an implementing agreement was achieved. Thus it asks for more than observance of Agreement would give.

"Strict logic", as the Organizations urge, may call for a protective period which only begins to run when the Carrier serves its Section 4 notice after the issuance of this decision, rather than one which starts 90 days after the coordination actually was effectuated. However, the effect of the decision is to give full recompense for all compensation loss occasioned by the unauthorized coordination. To add to the several years of compensation thus awarded Agreement benefits for five more years seems to me to go beyond an appropriate remedy for the improper Carrier action. Had the Agreement procedures been followed lesser amounts would have been payable to affected employees. Moreover, the protection of some sections, such as Section 10, would be most needed during the period following actual coordination and should be made available for the period following the changes which caused employees to move their places of residence. If Carriers consider this illogical, the alternative would be to adopt the Union proposal to start the protective period after Section 4 notices are given.

(2) Affirmative Orders Directing Observance of Section 4 and 5.

In this and other cases the Organizations seek affirmative orders directing the giving of notice of intended coordination and negotiation of an implementing agreement. Carriers argue that the Referee has no authority to order such a remedy and that compensatory payments under Section 6 and 7 are remedy enough for failure to observe Sections 4 and 5.

Quite clearly Sections 4 and 5 impose requirements beyond the later sections which accord compensatory benefits. It has been held that Carriers must negotiate an implementing agreement before putting a coordination into effect. Dockets Numbered 70 and 5. The requirement is not simply a formal one; collective bargaining may help achieve a more effective and acceptable plan of coordination than one promulgated unilaterally.

Nor is the Carrier argument that it can observe its contractual undertaking or breach and pay damages persuasive, especially because it maintains that allowances under Section 6, 7 and other provisions constitute compensation for such breach. Clearly they do not; they are independently required by the Agreement. The observe or breach and pay approach no longer enjoys much credit in regard to commercial contracts. In the realm of labor relations it is an invitation to chaos and additionally is impracticable because placing a monetary value on the breach will so often be difficult or impossible.

Contrary to the contention that the Agreement confers no remedy power upon the Section 13 Committee, Section 13 specifically provides that unresolved disputes over "interpretation, application or enforcement of any provisions of this agreement" (emphasis supplied) may be referred to and decided by this Committee. Such an assignment would seem necessarily to comprehend a decision as to how enforcement is to be effectuated. In the face of a Carrier contention that a violation of Sections 4 and 5 need not be remedied by their observance, nothing less than a direction to observe them will do. (And if the parties do not conclude the requisite agreement this Committee can write one for them. Docket No. 70.)

Nor are notices and an implementing agreement sterile, academic exercises. They require specific Carrier proposals and provide the opportunity for Organization participation in deciding how best to effectuate the coordination, thereby bringing to bear the knowledge and experience of the employees and consideration of their interests which must be reconciled with the interests of the coordinating Carriers in achieving maximally efficient and productive arrangements.

Nor would I regard the serving of notices and the negotiation and execution of an implementing agreement as moot if, as is possible, the protective period measured from 90 ninety (sic) after the coordination was put into effect should expire before such an agreement is concluded. Those procedures are important parts of the Agreement and nothing less than an implementing agreement actually achieved and put into effect will discharge the obligations of the parties.

DECISION

(a) The discontinuance of the Baltimore and Ohio City Ticket Office and the transfer of its operations and services to the Cincinnati Union Terminal Ticket Office constituted a "coordination."

(b) The lack of a notice of coordination and of an agreement between the Organization and the non-application of the benefit provisions of the Washington Agreement constituted violations of the Washington Agreement.

(c) The Carrier is directed to pay full back pay (i.e. based upon the average of compensation earned in the 12 months preceding the dates of the changes and including all fringe benefits and improvements in pay and fringes since that time), less actual wages and/or benefits received to all employees affected by those unauthorized changes until Section 4 notices are served and a Section 5 implementing Agreement is achieved. The protective conditions under the Washington Agreement shall be in force through March 31, 1967.

The Carrier is further directed to serve the required notices and negotiate the required agreement.

DOCKET NO. 107 --- Withdrawn by Parties

The Pennsylvania Railroad Company and Lehigh Valley Railroad Company vs. Lighter Captains Union, Local 996 International Longshoremen's Association; International Organization of Masters, Mates and Pilots, Inc.; Seafarers International Union; Transport Workers Union of America; Marine Engineers Beneficial Association; Sheet Metal Workers International Association, System Federations 96 and 152; Brotherhood of Railway Carmen of America, System Federation 96; International Brotherhood of Electrical Workers, System Federation 96; International Association of Machinists, System Federation 96 and 152; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, System Federations 96 and 152; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, System Federation 96; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes	PARTIES TO DISPUTE

QUESTION: 1. Should the Carriers' proposals for the selection and assignment of employes set forth in the proposed agreements attached hereto as Exhibits "J", "K", "N", and "P", be adopted for effectuating the coordination of Pennsylvania and Lehigh Valley marine facilities, services and operations in the New York harbor area?

Revised Standards for Preemption of Collective Bargaining Agreements for Transactions Initiated Pursuant to Section 11323 of the Interstate Commerce Act

This agreement between UTU and the signatory Class I Carriers is intended to set forth standards to be applied by Class I railroads and the involved labor Organizations when the Carriers seek to override or modify Collective Bargaining Agreements in the implementation of consolidations, mergers, and acquisitions of control ("Major Transactions") pursuant to Section 11323 of the Interstate Commerce Act. This agreement does not apply when a Carrier is not seeking to override or modify Collective Bargaining Agreements in such circumstances.

Conditions

1. The procedures set forth herein will be prescribed by statute and not as a condition imposed and administered by the Surface Transportation Board, or any successor agency. The terms of this agreement will become null and void when enacted into law. However, pending enactment of such statutory language, the Class I railroads signatory to this agreement agree to be bound by its terms and conditions as they relate to any notices served pursuant to either protective conditions voluntarily reached by the parties or imposed by the Surface Transportation Board in the approval of a "Major Transaction" where the applicant Carriers are seeking to override or modify an existing Collective Bargaining Agreement.

2. The terms of this agreement when enacted in statutory form will not be subject to the current exemption provision in the Interstate Commerce Act, 49 U.S.C. Section 11321(a), or any future exemption provisions, and the parties will agree on appropriate statutory language to that effect. Until enactment of such statutory language, the Class I carriers signatory to this agreement agree that they will not assert such exemption authority.

3. Except as provided in paragraph 4 below, the procedures set forth in this agreement will apply to any notice for an implementing agreement by any carrier party that seeks to override or modify Collective Bargaining Agreements, whether under existing merger, control or acquisition authority or any such authority sought or granted in the future by the STB or any successor agency.

4. The procedures set forth herein do not apply to any implementing agreements established prior to the date of this Agreement as a consequence of voluntary negotiations or arbitration pursuant to protective conditions imposed by the ICC or STB. Such implementing agreements will be conclusive and continue in effect as to all issues resolved, including provisions for procedures to be used in subsequent consolidations, coordinations or transfers of work and/or employees. Such provisions, however, shall not be used to change any Collective Bargaining Agreement unless specifically provided therein. A list of implementing agreements containing provisions that provide for changes in Collective Bargaining Agreements is attached as Addendum A. If an implementing agreement is, by oversight, not listed in Addendum A, it will subsequently be added to the list, although the carrier has the burden of showing that such addition is appropriate.

5. This agreement only addresses the current authority of the STB to override or modify collective bargaining agreements in implementing issues for major transactions. This agreement is not intended to alter or change the substantive provisions of existing protective benefit agreements or in any way address or restrict the authority of the STB to impose protective conditions in major transactions.

6. The provisions of this agreement shall not deprive a Carrier of any right to take any action allowed under any applicable existing or future Collective Bargaining Agreements, nor shall the Organization be deprived of asserting that no such right exists, all subject to any dispute resolution mechanisms provided in such agreements or under the Railway Labor Act itself.

7. This agreement will not bar the parties, by mutual agreement, from addressing any matter contained in this agreement in an alternative manner.

Consolidation or Coordination

1. A Consolidation or Coordination is a change that unifies, consolidates, merges, or pools, in whole or in part, the facilities, equipment, or employees of two or more rail Carriers (or former rail carriers), or any of the operations or services performed by such Carriers. A Consolidation or Coordination does not include a "Transfer of Work".

2. Where the work embraced by a Consolidation or Coordination is subject to two or more Collective Bargaining Agreements, the Organization may choose (from among those two or more agreements) which Collective Bargaining Agreement will apply to the Consolidation or Coordination. If the union fails to select a single Collective Bargaining Agreement within the time frame for negotiations contained in the New York Dock conditions, the single agreement to apply shall be determined by the Arbitrator. In making such determination, the arbitrator shall choose the agreement most beneficial to the employees involved as to rates of pay, rules and working conditions, including crew consist agreements.

3. In situations where the Collective Bargaining Agreements chosen by two or more Organizations contain inconsistent provisions that would create inefficiencies in the operation, which did not exist previously, the Organizations involved shall coordinate their choices to eliminate such inconsistencies. If the involved Organizations fail to do so within the time frame for negotiations contained in the New York Dock conditions, the Arbitrator shall resolve such inconsistencies. In making such determination, the arbitrator shall choose the agreement most beneficial to the employees involved as to rates of pay, rules and working conditions, including crew consist agreements.

4. For purposes of determining compensation protection, an Organization's selection of a Collective Bargaining Agreement with lower wage rates shall not be treated as a decision by affected employees to "voluntarily" place themselves on lower rated positions.

5. The Collective Bargaining Agreement selected by the Organization or Arbitrator may only be modified as follows:

a) Work Jurisdiction Rules shall be subject to modification only to the extent that the selected agreement does not permit employees to perform work throughout the Consolidated or Coordinated territory.

b) Seniority District/Territory Boundaries shall be subject to modification as necessary to permit the Consolidation or Coordination. Such modification shall not, however, cause employees who were in service on the effective date of the Consolidation or Coordination to lose their seniority date on any territory where they previously held seniority and they shall be permitted to exercise such seniority. However, employees cannot be forced to a new location until they exhaust all seniority at their home location. Nothing in this agreement shall be deemed to change the obligations of an employee to exercise seniority for purposes of protective benefits.

c) Provisions relating to seniority of all employees involved in the Consolidation or Coordination shall be integrated by agreement between the involved Carrier(s) and Organization(s) with disputes to be resolved by the Arbitrator. Train Service Rosters and Engine Service Rosters shall not be consolidated with each other. [Applicable to Operating Crafts Only.]

Transfer of Work

1. A Transfer of Work is where work and/or positions (and/or employees) are transferred from one location to another.

2. In the case of a Transfer of Work, the Collective Bargaining Agreement applicable at the location to which the work, positions, and/or employees are to be transferred will apply to the transferred work, positions, and/or employees.

3. Provisions relating to seniority of employees who transfer to the new location in connection with a Transfer of Work shall be integrated by agreement between the involved Carrier(s) and Organization(s) with disputes to be resolved by the Arbitrator. Train Service Rosters and Engine Service Rosters shall not be consolidated with each other. [Applicable to Operating Crafts Only.]

System Wide Issues

The Parties recognize that terms of Collective Bargaining Agreements applicable to a portion of a Carrier's system may give rise to operating incompatibilities or may be inconsistent with the establishment of uniform system-wide administrative procedures. Accordingly, notwithstanding any

of the preceding provisions or conditions, where Collective Bargaining Agreements interfere with the Carriers' right to take the following actions, those agreements may be changed by the Carrier in the following limited circumstances:

1. to ensure a uniform payroll system, including uniform system-wide practices regarding dates for the payment of wages and/or direct deposit of paychecks;

2. to provide for uniform crew calling practices;

3. [other identified situations to be determined for each other involved craft.]

Dispute Procedures

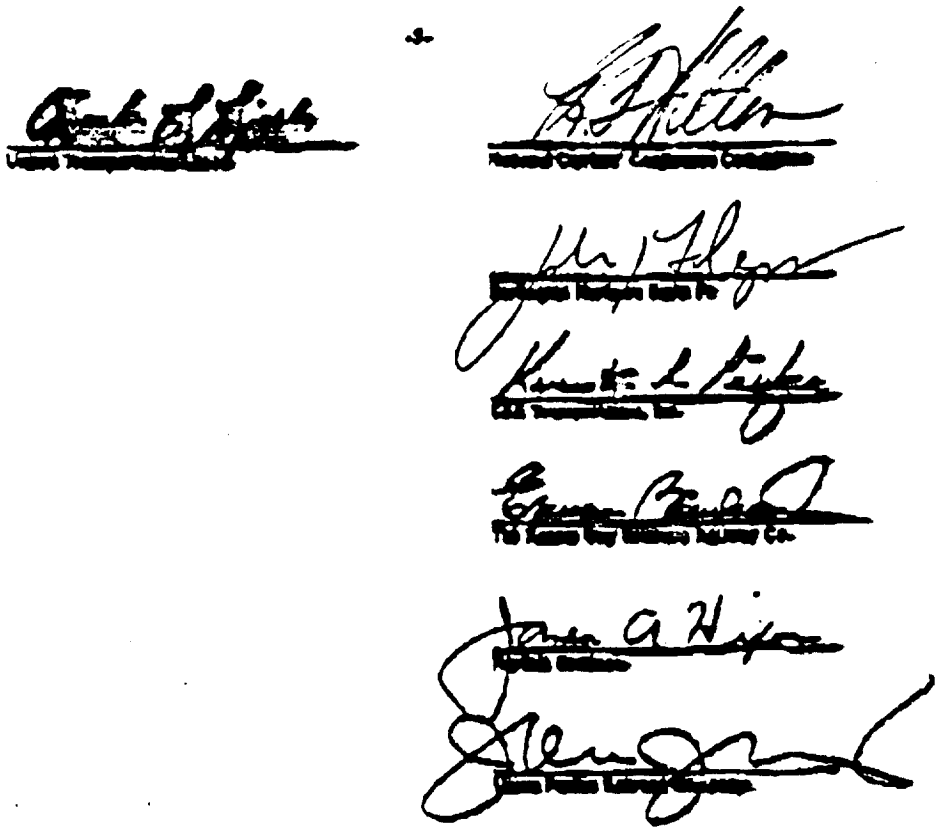
All disputes are to be resolved in accordance with Section 4 of the New York Dock conditions.

Review Procedures

The award of an Arbitrator under this agreement shall be subject to review by the United States Court of Appeals for the District of Columbia under statutory provisions and standards applicable to review of agency adjudications.

Enforcement

This agreement is enforceable in any United States District Court in whose jurisdiction the involved Carrier operates.



DATED: FEBRUARY 11,2000